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In The Supreme Court of the United States

ESTATE OF J. D. DAVIS AND J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS,

Petitioners,

v.

DOROTHY L. DAVIS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee, Middle Section At Nashville

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in probating a will of a deceased husband who was a domiciliary of Tennessee, the Tennessee courts may constitutionally (under the Full Faith and Credit provision of Article IV, §1) decline to enforce an antenuptial agreement at the behest of the surviving wife, a domiciliary of Florida, on grounds that the relevant Florida statute, which validates enforcement of the antenuptial agreement, violates the "public policy" of Tennessee, even though:

- Tennessee's choice-of-law rules dictate that the antenuptial agreement "be construed under Florida law" (App. at A-6);
- Under Florida law, the antenuptial agreement is valid and enforceable (App. at B-2);
- No evidence indicates that either husband or wife intended the agreement to be construed under Tennessee law (App. at A-6);
- Tennessee law recognizes that antenuptial agreements are to be "interpreted and enforced like any other contracts" (*Soloman v. Murrey*, 2002 Tenn. App. LEXIS 734, at *9 (2002) (construing Tenn. Code Ann. §36-3-501));
- Tennessee law recognizes that husband and wife, as in this case, may have separate domiciles (*Younger v. Gianotti*, 138 S.W.2d 448 (Tenn. 1940)); and
- The Tennessee courts made no choice-of-law or other analysis showing that Tennessee courts were constitutionally authorized to disregard otherwise-applicable Florida law.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Estate of J. D. Davis and J. Douglas Davis and Julie Ann Davis Griffin, co-executors, respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Tennessee in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A-1 through A-17) was entered on September 2, 2004, and is reported at 2004 Tenn. App. LEXIS 585. The unreported order of the Tennessee Supreme Court denying review was entered on February 28, 2005. (App. C-1) The unreported order of the Tennessee Supreme Court denying the Petition for Rehearing was entered on May 2, 2005. (App. D-1) The unreported order of the Davidson County Circuit Court (Probate Division), granting Petitioners' motion for summary judgment and dismissing Respondent's claims with prejudice, was entered on April 23, 2003. (App. B-1 through B-3)

JURISDICTION

The Court of Appeals entered its judgment on September 2, 2004. (App. A-17) Petitioners timely filed an Application for Permission to Appeal with the Tennessee Supreme Court on October 28, 2004. (App. C-1) On February 28, 2005, the Tennessee Supreme Court denied permission to appeal. (App. C-1) On March 10, 2005, Petitioners timely filed a Petition for Rehearing. (App. D-1) On May 2, 2005, the Tennessee Supreme Court denied

the Petition for Rehearing. (App. D-1) This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of Article IV, §1 (the Full Faith and Credit Clause) to the United States Constitution, the federal full faith and credit statute (28 U.S.C. §1738), and the relevant provisions of Tennessee and Florida law are set forth in Appendix E.

STATEMENT OF THE CASE

In General. The constitutional issue in this matter is Petitioners' Full Faith and Credit Clause (FFC) challenge to the Tennessee Court of Appeals' use (or mis-use) of the "public policy" doctrine to nullify Tennessee's choice-of-law principles and deny enforcement of an antenuptial agreement made in Florida and enforceable under Florida law. As applied by the Tennessee Court of Appeals herein, the one-dimensional "public policy" doctrine "threatens the fundamental conceptions [of federalism] underlying the entire conflicts law." Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 971 (1956).

Under Tennessee's choice-of-law rules, Florida law controls enforcement of the agreement. (App. A-6) No evidence indicates that either party to the agreement (husband or wife) intended the agreement to be construed under Tennessee law. (App. A-6) Tennessee recognizes that antenuptial agreements are to be "interpreted and

enforced like any other contracts," *Soloman v. Murrey*, 2002 Tenn. App. LEXIS 734, at *9 (2002) (construing Tenn. Code Ann. §36-3-501), and that husband and wife, as in this case, may have separate domiciles (*Younger v. Gianotti*, 138 S.W.2d 448 (Tenn. 1940)).

The Court of Appeals in this case acknowledged that Tennessee's choice-of-law principles required application of Florida law and enforcement of the antenuptial agreement. (App. A-6) Nevertheless, the court declined to give effect to Tennessee's choice-of-law principles or to Florida law in this case. It used "public policy" doctrine as a one-dimensional "roving ... 'exception'" to conventional choice-of-law analysis in order to substitute Tennessee law for Florida law. *See Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998). In the process, the Court of Appeals failed to take into account the federalism-based constitutional principles that inhere in choice-of-law analysis. *See* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 112 (1991) (noting that "federalism" is the "key constitutional concept in interstate relations" as embodied in FFC).

The Court of Appeals' decision was based on a raw, one-dimensional preference for the substantive content and outcome of the relevant Tennessee laws. It did not take into account the critical threshold issue of whether Tennessee had authority to follow its own law – whether it was "competent to legislate" on the matter. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003) (internal cite omitted). That requires examination of whether there was any "occurrence" or something to be done "to which the law of [Tennessee] could apply." *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936). *See also Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

Further, the Court of Appeals did not address the obligations that Tennessee might have, under principles of federalism embraced in FFC, to give recognition to and enforce the law of another state. *See, e.g., Broderick v. Rosner*, 294 U.S. 629 (1935). Nor did the one-dimensional analytical approach of the Court of Appeals take into account other critical elements of FFC such as the "element of unfair surprise or frustration of legitimate expectations as a result of [Tennessee's] choice of its law." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 n.24 (1981) (plurality). In short, by focusing exclusively on the "public policy" of Tennessee, the one-dimensional analytical approach of the Court of Appeals was bereft of the necessary components of a multi-dimensional FFC analysis that addresses or takes into account the nuanced, constitutionally-mandated elements of FFC doctrine.

That mode of analysis has been described as a "traditional but dubious use of the term 'public policy' to obscure [what is really] 'an assertion of the forum's right to have its [own] law applied to the [controversy] because of the forum's relationship to it.'" *Baker,* 522 U.S. at 233 n.6 (internal cite omitted). Invocation of "public policy" in such circumstances is a *deus ex machina* that disregards or even undermines the careful consideration of multi-dimensional constitutional principles of federalism that undergird choice-of-law doctrine under FFC.

By focusing solely on outcome, on the divergent content of the Florida and Tennessee laws, and on the expression of preference for the substance of Tennessee's law, the Court of Appeals avoided consideration of the kind of "functional analysis of the choice-of-law" problem mandated by FFC principles. As the author of a leading treatise puts it, "[u]nder no circumstances should a forum

use public policy to apply its own law on the merits. Choice of forum law should be justified by a complete choice-of-law analysis." RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAWS 109 (4th ed. 2001). That did not happen in this case; that type of evasion, all too characteristic, risks an end-run around core FFC principles – mandated by considerations of federalism – by casting them into the bin of doctrinal desuetude.

The "public policy" doctrine has been described by Stanford Law School Dean Larry Kramer as "among the hoariest of hoary conflicts doctrines," calling for judicial clarification because of the "relative degree of disarray in the states." Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1966, 1979 (1997). Dean Kramer's sentiment is echoed by University of Texas Law School Associate Dean Douglas Laycock, who has characterized the doctrine as a "relic carried over from international law." Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 313 (1992). As in this case, "public policy can serve as a substitute for thinking," a form of "intellectual laziness" about choice-of-law rules. Paulsen & Sovern, *supra*, 56 COLUM. L. REV. at 987.

The Court of Appeals declined to apply otherwise-controlling Florida law under Tennessee's choice-of-law rules. The sole reason was that, based on its content, the relevant Florida law purportedly was at odds with Tennessee public policy. No analysis of choice-of-law principles took place; no consideration of Tennessee's obligation to the law of Florida occurred; no consideration was given to Tennessee's obligation to implement the choices of the

parties to the agreement; and no analysis took place of the constraints on Tennessee's authority to protect the interests of a non-domiciliary who had made an agreement that was legally binding and enforceable in her state of domicile (Florida). *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996) (principles of state sovereignty limit the ability of a state to encroach on "policy choices of other States" and confine a state's ability to act in certain circumstances to "protecting its own consumers and its own economy"); *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003) (same). Only considerations of Tennessee's own interests mattered; the bare assertion was made that generally applicable Tennessee choice-of-law principles would not apply because the result of the choice-of-law analysis would conflict with Tennessee's public policy.

That circumvention of longstanding choice-of-law doctrine can effectively abrogate or marginalize the federalism-derived constitutional constraints that underlie FFC and that this Court has built into choice-of-law principles under FFC.

While it is true that FFC analysis no longer encompasses balancing the interests of one state against that of another, *Franchise Tax Bd.*, 538 U.S. at 498-99, it also is true that FFC analysis does require consideration of the proper and properly delimited scope of authority of a forum state to legislate on a matter, to disregard the law of another state, and unfairly to surprise or frustrate parties' expectations. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985); *Allstate Ins. Co.*, 449 U.S. at 312-13, 318 n.24.

The Specifics. J. D. Davis, the decedent, was a domiciliary of Tennessee when he met Dorothy L. Davis, a Florida domiciliary, in 1989. They married in Florida in 1990; Mr. Davis was 75 years of age, Ms. Davis was 66. (App. A-2)

Both Mr. and Ms. Davis had been married previously, both had children from their previous marriages, both were in good health, and both were financially comfortable. (App. A-2) After their marriage, Mr. Davis remained a Tennessee domiciliary and Ms. Davis remained a Florida domiciliary. Tennessee law recognizes that a married couple can have separate domiciles. *Younger*, 138 S.W.2d at 445.

The Davises entered into a reciprocal antenuptial agreement in Florida. The agreement recorded their "desire that all property now owned or hereafter acquired by each of them shall, for testamentary disposition, be free from any claim of the other that may arise by reason of their contemplated marriage." Further, "[e]ach party during his or her lifetime shall keep and retain sole ownership, control and enjoyment of all his or her property, real and personal, free and clear of any claim of the other." (App. F-1)

In reflection of this overarching philosophy of reciprocal property assignment, both Mr. and Ms. Davis "waive[d] and release[d] any rights as surviving spouse to elect to take against the other's will, whether heretofore or hereafter made." They also reciprocally waived and released all marital rights to each other's property. (App. F-1 through F-2) The Court of Appeals acknowledged that "Florida law is the only law specifically referenced in the agreement," and found that nothing in the record suggested that either

Mr. or Ms. Davis intended that the agreement be construed under Tennessee law. (App. A-6)

Mr. Davis died in Florida on May 9, 2002, and his Will, which referenced the antenuptial agreement, was admitted to probate in Tennessee on May 15, 2002. (App. A-3) In December 2002, in contravention of the antenuptial agreement into which she had entered, Ms. Davis filed petitions for elective share, homestead, exempt property, and a year's support allowance against the estate of Mr. Davis. (App. A-3) The estate resisted, moving for summary judgment and enforcement of the antenuptial agreement.

The probate court granted summary judgment to the estate, finding that under Tennessee's choice-of-law provisions, Florida law applied to the agreement. Under Florida law, the agreement was valid and enforceable. (App. B-1 through B-2)

On appeal, the Court of Appeals agreed that under Tennessee's choice-of-law provisions, Florida law applied to the agreement. (App. A-6) After extensive analysis of both Florida statutory and case law, including statutory changes in Florida law addressed to this issue, the Court of Appeals concluded that the Florida legislature specifically amended its law to give effect to antenuptial agreements in the context of probate, even in the absence of disclosure of assets. (App. A-11)

Under Tennessee law, antenuptial agreements are only valid with adequate asset disclosure. *Randolph v. Randolph*, 937 S.W.2d 815 (Tenn. 1996). Even though Tennessee's choice-of-law rules dictated application of Florida law, the Court of Appeals trumped Tennessee's choice-of-law principles and refused to give effect to

otherwise-applicable Florida law. Application of Florida law would violate "a substantially important public policy of the State of Tennessee." (App. A-15) Without further analysis of choice-of-law principles and even though Tennessee's choice-of-law provisions called for application of Florida law, the Court of Appeals construed the agreement under Tennessee's substantive law. (App. A-15)

The result of the Court of Appeals' decision is that it improperly "invoke[d] its own public policy to affect the result on the merits." WEINTRAUB, *supra*, at 108. This practice of using "public policy" doctrine to "undercut" content-disfavored results from the neutral application of choice-of-law doctrine has been described as "achieving the desired effect by a misleading route," Paulsen & Sovern, *supra*, 56 COLUM. L. REV. at 996, and has been condemned by commentators for years. *Id.* at 1016 (If "public policy doctrine substitutes for choice of law," a court should address itself "directly to questions concerning choice of law policy").

REASONS FOR GRANTING THE PETITION

THE ISSUES ARE OF NATIONAL IMPORTANCE AND THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR ESTABLISHING SOME STANDARDS IN A FIELD SUFFERING FROM LONGSTANDING NEGLECT AND DOCTRINAL DISARRAY

This Court should grant review herein either to clarify how FFC considerations enter into the analysis of "public policy" or to conclude, as contended by Dean Kramer, that it is unconstitutional under FFC for a state to refuse "to apply another state's law, otherwise applicable under

forum choice-of-law rules, on the ground that it promotes a policy the forum finds repugnant." Kramer, *supra*, 106 YALE L.J. at 1987. In the alternative, this Court could articulate a decisional-process requirement under FFC, requiring that courts confront and address the question of whether competence to legislate in a particular matter exists, not just determine in a one-dimensional manner whether a law of another state conflicts with the public policy of the forum state.

A. Some Background

As this Court has explained, the "animating purpose" of FFC was to make states "integral parts of a single nation," providing a constitutionally-based enforceable "remedy" across states that "might be demanded as of right, irrespective of the state of its origin." *Baker*, 522 U.S. at 232 (internal cite omitted). FFC, and as implemented by federal law, 28 U.S.C. §1738, "substituted a [constitutional] command for the earlier principles of comity." *Id.*

A fundamental issue posed by FFC analysis – and the one presented herein – deals with the situation when a state has "sufficient contact with the parties or with the facts so that, within the limits of due process, its law may be used in adjudicating a controversy arising between the parties on those facts." The FFC question in such a situation is "[u]nder what circumstances will the use of that state's law nevertheless violate the requirements of full faith and credit?" WEINTRAUB, *supra*, at 619.

The answer to that question requires a sensitive, multi-dimensional consideration not only of the forum's own interests and policies, but also of (i) the forum's

obligations to other states and (ii) to the parties and (iii) of the forum's own limitations as one state among co-equal sovereigns. While states have flexibility in giving effect to their own policies and interests, that flexibility is constrained by the accommodationist requirements of FFC.

B. The Doctrinal Basics

FFC applies to "laws (legislative measures and common law) and to judgments." *Baker*, 522 U.S. at 232. This case deals with FFC's application to the "laws" of Florida, and "command" of FFC that Tennessee adhere to its own choice-of-law rules, which dictate the application of Florida's law to the enforcement of the antenuptial agreement at issue.

Florida's law expressly validates and provides for enforcement of the antenuptial agreement, even if there was no disclosure of assets by the parties. Tennessee's law, while enforcing antenuptial agreements under standard contract doctrine, requires asset disclosure.

In determining what law to apply in its choice-of-law analysis, a forum state has considerable flexibility in determining the relative strength of the interests of the affected states. As part of its choice-of-law analysis, a forum state may take into account its own public policy interests in "determining the *law* applicable to a controversy." *Id.* at 233 & n.6 (emphasis in original). A state may adopt its own law on matters about which it is "competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). But whether a state is "competent to legislate" is part of the inquiry of choice-of-law analysis, and that inquiry is constitutionally

constrained by FFC principles. *See Phillips Petroleum Co.*, 472 U.S. at 818-19.

In determining what law to apply in its choice-of-law analysis, a forum state must select that law "in a constitutionally permissible manner," which requires the state to "have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co.*, 449 U.S. at 312-13.

The "arbitrar[iness]" prong of *Allstate* encompasses two related federalism-based concerns. First, a state has an obligation as one of many co-equal sovereign states to "respect the laws" of other states. *Phillips Petroleum Co.*, 472 U.S. at 819. Second, a state is "competent to legislate" only about matters in which it has legitimate "state interests" that are created by contacts with the parties or the transaction. The "contacts" that are relevant under FFC analysis differ from those that are relevant under analysis of personal jurisdiction; a state may have sufficient contacts to serve as a forum but still not be competent to apply forum law when that is in conflict with the law of another jurisdiction. *Id.* at 821.

The contacts inquiry in FFC analysis is designed to "delimit spheres of state legislative competence." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988). The nature and extent of "contacts" in FFC analysis are important because they "creat[e] state interests," *id.*, that, at the threshold, allow a state to legislate about a matter and establish a state's "competenc[e] to legislate." *Franchise Tax Bd.*, 538 U.S. at 496. Thus, a state might not be competent to legislate about the substantive law "governing the validity

and effect of contracts," *Sun Oil Co.*, 486 U.S. at 726, if insufficient contacts exist to create "state interests" that make that state competent to legislate.

The "fairness" prong of FFC analysis examines whether application of the law of a specific jurisdiction brings about "unfair surprise or frustration of legitimate expectations." *Allstate*, 449 U.S. at 318 n.24. A particularly important element of the "fairness" analysis is the "expectation of the parties." *Phillips Petroleum Co.*, 472 U.S. at 822.

Thus, there is a constitutional time and place for "public policy" analysis – as part of the choice-of-law analysis. That is the place in which a court can consider the arbitrariness and fairness elements of FFC doctrine, the federalism-driven questions of how the law of one state can appropriately be accommodated to the law of other jurisdictions. This, of necessity, is a multi-dimensional analysis, and the kind of one-dimensional analysis employed by the Court of Appeals under the heading of "public policy" just cannot – methodologically or substantively – deal appropriately with the nuanced issues that arise inherently in the context of FFC analysis.

C. The "Public Policy" Doctrine

As applied by the Court of Appeals herein, the "public policy" doctrine provides that a law of a non-forum state that is otherwise applicable – *e.g.*, a "substantive provision[] . . . governing the validity and effect of contracts," *Sun Oil*, 486 U.S. at 726 – might nonetheless be refused application in a particular circumstance if application of that law is contrary to the public policy of the forum.

This use of the "public policy" doctrine is analytically deficient – anomalous and anachronistic. It is one-dimensional in that it only asks the question of whether the law of a foreign state conflicts with the public policy of the forum state. It does not address and does not provide a methodological vehicle for addressing the pivotal FFC questions – whether, under *Allstate*, application of forum law and disregard of foreign-state law are arbitrary or unfair.

Contemporary choice-of-law analysis, Restatement, Second, Conflict of Laws §6, is designed to identify the competing considerations in determining whether forum law or the law of another state should be applied. That inquiry encompasses the interests and policies of the forum state, as well as the other elements (including FFC considerations) that shape the decision about which law should apply. Invocation of the "public policy" doctrine, without further analysis or reasoning, allows a court to disregard the consequences of its choice-of-law analysis on the basis of the specific content of a foreign jurisdiction's legislation, without further regard to FFC considerations of federalism that constrain the forum state's ability to apply its own rule of law. It does not direct a court's attention to the analytically relevant questions under existing FFC doctrine.

As Professor Weintraub has stated, "[w]hen the forum does have policies that it can fairly impose on nonresidents, the forum should make a functional analysis of the choice-of-law problem, select either forum law or foreign law, and render a decision on the merits." WEINTRAUB, *supra*, at 109.

What the Court of Appeals did in this case is to use the "public policy" doctrine as a vehicle for refusing to apply Florida law, which was otherwise (concededly) applicable under Tennessee's choice-of-law rules, on the ground that application of Florida law "promotes a policy the forum finds repugnant." Kramer, *supra*, 106 YALE L.J. at 1987.

When courts use "public policy" analysis as the Court of Appeals did in this case – not as *part* of a multi-dimensional federalism-sensitive or fairness-sensitive choice-of-law analysis but as an after-the-fact one-dimensional *trumping* of that choice-of-law analysis – then FFC's constitutional principles, as reflected in existing law, get shortchanged.

The Court of Appeals entered into no analysis of the fairness (or unfairness) to the parties that arises from disregarding Florida law; after all, the parties had contemplated that Florida law would govern their agreement. (App. A-6) And the Court of Appeals said nothing about the propriety (*i.e.*, arbitrariness) of applying Tennessee law to defeat a reciprocal contract entered into in Florida that reflected a progressive recognition that couples could maintain their autonomy by retaining separate domiciles (each subject to the rights and responsibilities of their respective state of domicile). For cases restricting the extraterritorial effect of a state's substantive law, see *Home Ins. Co.*, 281 U.S. 397 and *John Hancock Mutual Ins. Co.*, 299 U.S. 178 (each discussed in *Allstate*, 449 U.S. at 309-11).

D. The Problem and Its Implications

For over fifty years, this Court has made it clear that states are not constitutionally free to apply forum law based on their own "public policy" without consideration of FFC principles. In *Hughes v. Fetter*, 341 U.S. 609, 612 (1951), Wisconsin declined to entertain a wrongful death action created by Illinois statute. This Court held that Wisconsin's "public policy" choice must be considered in the context of and balanced with the "strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states."

Fetter held that the Wisconsin policy had to give way since, under the circumstances, it was "forbidden by the national policy of the Full Faith and Credit Clause." *Id.* at 613. While forum states may apply their vision of substantive public policy to some extent, their own vision of their own interests is not the only consideration. Balancing of the interests of one state against the interests of another state may no longer be required under FFC, see *Franchise Tax Bd.*, 538 U.S. at 495-97, but the interests of any single state must be considered in the context of the national interest – the "strong unifying principle embodied in the Full Faith and Credit Clause." And *Fetter* holds that "it is for this Court to choose in each case between the competing public policies involved." *Fetter*, 341 U.S. at 611.

Fetter placed a limit on the scope of a state's authority to use one-dimensional "public policy" analysis as a rationale for defeating claims based on the law of other states. FFC places limits on a state's discretion to disregard and decline to give effect to the substantive law of

other states, but this Court in *Fetter* provided little doctrinal guidance. *See also Broderick*, 294 U.S. at 642-43 (per Brandeis, J.) (holding that a state may not use "public policy" to deny enforcement of claims arising from other states and otherwise within the protection of FFC since "the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity").

Another line of cases, culminating in *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947), held that the forum state must give effect to the law of the state of incorporation in construing the charter of fraternal benefit societies, even if the law of the state of incorporation violated the forum state's public policy. The bright-line rule is captured by Justice Holmes in *Modern Woodmen of America v. Mixer*, 267 U.S. 544, 551 (1925): "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law granting the incorporation."

These cases demonstrate that FFC places limits on the ability of a state to apply its "public policy" to defeat claims originating from other states. It is analytically deficient for a court to focus exclusively in a one-dimensional manner on the "public policy" of the forum state in determining whether to accord FFC to the law of another state. Yet that is what the Court of Appeals did in this case.

In *Allstate*, 449 U.S. at 309-13, this Court began the modern process of establishing a framework for considering choice-of-law issues under FFC.

One *Allstate* component addresses a state's authority to exercise its sovereign law-making authority over the matter at hand – its competence to legislate. This arbitrariness component limits the ability of states to project their power extraterritorially to abrogate rights or obligations of parties created by other states in the absence of sufficient contacts with the parties or the transaction that would justify assertion of forum law. *Phillips Petroleum Co.*, 472 U.S. at 821-22.

The other *Allstate* component – the fairness component – focuses on the fairness to the litigants of applying the forum's law. "[E]xpectation of the parties" is an especially important element of the fairness component. *Id.* at 822.

When a court (like the Court of Appeals below) relies exclusively on "public policy" as a basis for disregarding or declining to enforce the law of another state – and particularly when that analysis of "public policy" occurs outside of so as to trump the choice-of-law analysis – the federalism dimensions of FFC receive short shrift. For a state to determine that its public policy can never yield to the law of another state would mean that the public policy "exception would swallow the [choice-of-law] rule," thereby submerging and possibly eviscerating important precepts of federalism embodied in principles underlying FFC. Kramer, *supra*, 106 YALE L.J. at 1970. No opportunity is afforded under the "public policy" doctrine to consider either the arbitrariness or the fairness components of FFC doctrine under *Allstate*. And no case of this Court provides

the guidance needed of how or in what analytical methodological framework the multi-dimensional aspects of FFC doctrine are to be addressed or evaluated.[1]

In short, a doctrine-clarifying decision such as *Allstate* is needed for the "public policy" doctrine. This case provides an excellent vehicle for such a clarification.

E. This Case As a Good Vehicle

This case provides an excellent vehicle for this Court to address the "public policy" doctrine and its proper and properly delimited role in FFC analysis.

Separate Marital Domicile. Failing to give effect to the agreement under Florida law, where Ms. Davis is domiciled, could set back the progressive trend of allowing both spouses the autonomy of maintaining their own and their independent domicile of choice. This case provides an opportunity for this Court to determine whether marital domicile means one thing when a married couple has a

[1] Indeed, the case usually cited for the proposition that a state cannot rely on its own public policy to trump all inconsistent laws from non-forum jurisdictions – an obvious principle of limitation if states must, in some circumstances, give effect to non-forum laws that conflict with substantive policies of the forum state – is a New York case, not a case of this Court. *See Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918) (per Cardozo, J.) (courts should not decline to give effect to non-forum law unless application of the foreign law "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal"). *See* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 139-40 (3d ed. 2000) (stating that the "public policy exception to the enforcement of rights based on foreign law is to be construed narrowly: fundamental policies of the forum must be offended; mere differences between the law of the forum and of the foreign jurisdiction are not enough" but not referencing a decision of this Court other than *Fetter*).

single domicile and another when the spouses retain their own domiciles.

With respect to both the fairness component of FFC analysis under *Allstate* and the legislative competence (*i.e.*, "arbitrar[iness]") component of that analysis, this case provides an opportunity for the Court to consider the implication of separate marital domiciles on choice-of-law. The issues raised in the case also demonstrate the insufficiency of the one-dimensional "public policy" approach adopted by the Court of Appeals.

Under traditional common-law principles, "the wife's domicile was assigned by operation of law to that of her husband." EUGENE F. SCOLES ET AL., *supra*, at 264-65. In this case, husband and wife maintained separate domiciles. Tennessee law recognizes that husband and wife may maintain separate domiciles. *Younger*, 138 S.W.2d at 455.

Domicile is important because "the law has traditionally identified the state of the [marital] domicile as that state which has the greatest interest in the marital relationship" for choice-of-law purposes. SCOLES ET AL., *supra*, at 229. From the legislative competence perspective, may Tennessee substitute its law for that of Florida, Ms. Davis' domicile, when Ms. Davis has entered into an agreement that is legally valid and enforceable under Florida law?

In a very fundamental way, the Tennessee Court of Appeals' decision disrespects in a highly paternalistic manner the autonomous judgment of Ms. Davis to subject herself to the law of her own self-selected state of domicile (Florida). At the same time, because of Ms. Davis' choice of Florida domicile, the decision of the Court of Appeals projects Tennessee law into Florida to upset a legal regime

that the parties to the agreement sought out and intended to abide by.

(a) The case thus provides an excellent vehicle for considering the "fairness" component of FFC doctrine under *Allstate*.

An "important element" of the *Allstate* FFC "fairness" analysis is the "expectation of the parties." *Phillips Petroleum Co.*, 472 U.S. at 822. In this case, the autonomy of the parties, and especially that of Ms. Davis, are at issue. The Court of Appeals found that neither Mr. nor Ms. Davis expected Tennessee law to apply. (App. A-6) Ms. Davis retained her Florida domicile to be bound by (and privileged by) Florida law. She and Mr. Davis mutually and reciprocally agreed to renounce their interest in each other's assets since both were financially comfortable at the time of their marriage and they each had children to whom they felt an obligation. Under the circumstances, asset disclosure was beside the point (contrary to Ms. Davis' current allegations), and Florida law upon which the couple relied made such disclosure immaterial to the enforcement of the agreement. (Florida law recognizes a duty of asset disclosure for asset assignment agreements between spouses once the marriage has taken place.) (App. E-2 through E-3)

Tennessee law recognizes that antenuptial agreements are to be "interpreted and enforced like any other contracts." *Soloman v. Murrey*, 2002 Tenn. App. LEXIS 734, at *9 (construing Tenn. Code Ann. §36-3-501). Enforcement of the substantive provisions of a contract, as in this case, involves the application of substantive law. *Sun Oil Co.*, 486 U.S. at 726 ("[T]he rules governing the validity and effects of contracts" are "substantive provisions" not "procedural

restrictions"). So Tennessee cannot acquire an "interest" in the enforcement of the contract by an assertion of a "procedural" interest in its enforcement. *Id.* at 722-23.

The Court of Appeals' reliance on the "public policy" doctrine completely ignores this critical fairness element of FFC analysis. The Court of Appeals' decision focused only abstractly and one-dimensionally on the public policy of Tennessee, disregarding entirely the "fairness" analysis that inheres in FFC doctrine.

This contract was made in Florida, where the marriage took place, and the parties counted on its enforcement under Florida law. (App. A-6) Both spouses reciprocally sought protection of their assets for testamentary distribution to their respective children, which principle was honored by the antenuptial agreement and respected under Florida law. Given these circumstances, and especially since one of the parties is dead, application of Tennessee substantive law to undo the contemplation of the parties constitutes after-the-fact unfairness under FFC analysis – "unfair surprise" and "frustration of legitimate expectations as a result of [Tennessee's] choice of its law." *Allstate*, 449 U.S. at 318 n.24. Ms. Davis and eventually her children will be advantaged; the children of Mr. Davis will be disadvantaged. This differential treatment of their respective children was neither intended nor foreseen by the parties to the antenuptial agreement.

(b) This case also provides an excellent vehicle to explore the "arbitrar[iness]" prong of FFC analysis under the *Allstate* framework.

To justify its disregard of Florida law, Tennessee must be "competent to legislate" about the enforceability of the antenuptial agreement. *Sun Oil Co.*, 486 U.S. at 722. This means that Tennessee must have "contacts" with the parties or the contract that "creat[e] state interests" that it can legislate about. *Phillips Petroleum Co.*, 472 U.S. at 821. But Tennessee "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Id.* at 822 (internal cite omitted).

That Mr. Davis was a domiciliary of Tennessee is an insufficient basis to justify application of Tennessee's substantive law. *Id.* at 820 (citing *John Hancock Mut. Life Ins. Co.*, 299 U.S. at 182, and *Home Ins. Co.*, 281 U.S. at 408). By her own choice, Ms. Davis was a Florida domiciliary at the time the agreement was entered into and currently. Tennessee's refusal to give effect to the agreement affects the substantive contractual rights of the parties, *Sun Oil Co.*, 486 U.S. at 726, so Tennessee cannot assert a procedural administration-of-justice interest in enforcement of the antenuptial agreement. *Id.* at 730.

Just how would Tennessee characterize its constitutionally valid interest in disregarding the law of Florida? The Court of Appeals' reliance on the "public policy" doctrine allowed that court to finesse that issue, to avoid articulation or consideration of what that interest is. But it is far from clear that Tennessee has the competency to legislate in such a manner as to protect a marital non-domiciliary by declining to enforce a reciprocal pre-marital agreement, recognized as valid and enforceable under the law of her state of domicile, in the context of probate.

The probate of a will in Tennessee involves an *in rem* proceeding with the estate constituting the *res*. *In re Estate of Barnhill*, 62 S.W.3d 139, 144 (Tenn. 2001). But the real parties at interest in an *in rem* proceeding are the persons or entities whose rights and responsibilities regarding the *res* are subject of adjudication. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

A forum state has a legitimate interest in protecting a person who is a marital domiciliary of that state. A forum state has a legitimate interest in protecting persons injured in that state, *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954), even if they are nonresidents. *Pacific Employers Ins. Co.*, 306 U.S. 493. But a forum state "may not take a transaction with little or no relationship to the forum and apply the law of the forum." *Phillips Petroleum Co.*, 472 U.S. at 821.

Under the terms of the antenuptial agreement herein, entered into in Florida and intended by the parties to be enforced under Florida law, there was "little or no relationship" with Tennessee. Only mutual self-abnegation was called for. No conduct on the part of Ms. Davis, a Florida domiciliary, was contemplated in Tennessee at the time of Mr. Davis' death. Indeed, just the opposite was contemplated.

With respect to "accrual of the right asserted under the contract," that occurred in Florida; only non-action on the part of Ms. Davis was contemplated in Tennessee. Therefore, there is "no occurrence, nothing [to be] done, to which the law of [Tennessee] could apply." *John Hancock Mutual Life Ins. Co.*, 299 U.S. at 182. Tennessee "may not abrogate the rights of parties beyond its borders having

no relation to anything done or to be done within them." *Phillips Petroleum Co.*, 472 U.S. at 822 (quoting *Home Ins. Co.*, 281 U.S. at 410).

Recognition of separate marital domiciles necessarily entails recognition of a marital partner's decision to be bound by the law of her marital domicile – in this case Florida for Ms. Davis. Stated differently, Tennessee is projecting its sovereign authority in a manner that is beyond its proper scope of competency in its paternalistic effort to protect Ms. Davis from herself under the terms of Florida law. *Cf. United States v. Virginia*, 518 U.S. 515 (1996) (State university may not deny women access to "adversative" method of education because some educators believe that such educational methods are not well suited for women students).

In *BMW*, this Court noted the constitutional limits on the ability of a state to act to protect non-domiciliaries; a state can only impose economic sanctions in support of its "interest in protecting its own consumers and its own economy," not to protect the interests of nonresidents. *BMW of North America, Inc.*, 517 U.S. at 572; *accord*, *State Farm Mutual Automobile Ins. Co.*, 538 U.S. at 421-22. Ms. Davis was not domiciled in Tennessee when she was married or when she entered into the antenuptial agreement, and she is not now a Tennessee domiciliary. The state at this point has no contacts with her other than serving as a forum for the adjudication of her claim to a portion of the estate of her late husband. Tennessee, consequently, is not "competent to legislate" about the enforcement of the antenuptial agreement, and Tennessee may not decline to apply Florida law to enforcement of that agreement. Tennessee's disregard of Florida law is,

therefore, "arbitrary" under the FFC standard set forth in *Allstate*.

The contrary decision of the Court of Appeals under the "public policy" doctrine is analytically deficient in that it does not address what are, for FFC purposes, the critical issues. This Court should grant review to clarify and develop the law in this important area.

Nature of Contacts in FFC Context. The plurality in *Allstate* established the importance of "contacts" in FFC analysis. It spoke in terms of "significant" contacts or a "significant aggregation of contacts" that created interests about which the state would be competent to legislate. *Allstate Ins. Co.*, 449 U.S. at 308. The *Allstate* decision also noted the importance of "relevant" contacts. *Id.* at n.10. In his concurrence, Justice Stevens sought to develop the concept of what type of contacts were significant and why. *Id.* at 320. Justice Powell's dissent, however, criticized the plurality because he did not believe that it had "adequately analyze[d] the policies that [significant contact] review must serve." *Id.* at 332.

Despite some further elaboration in *Phillips Petroleum Co.*, noting that "contact" analysis under FFC and under personal jurisdiction differed, there has not been much elaboration of what goes into the FFC "significant contact" review. *Phillips Petroleum Co.*, 472 U.S. at 818-23. The language about "aggregation" of contacts suggests that the "extent" of contacts is important. But, there has not been much development regarding the "nature" of "relevant" contacts.

This inquiry is important because the Court has rejected an approach to FFC that encompasses a balancing of sovereign interests among competing states. *Franchise Tax Bd.*, 538 U.S. at 495-97. Consequently, the focus of inquiry in determining how "to delimit spheres of state legislative competence," *Sun Oil Co.*, 486 U.S. at 727, must be more categorical in character. In *Sun Oil Co.*, the Court drew a categorical distinction between substantive and procedural rules, allowing states to legislate regarding procedural rules (statutes of limitation there). *Id.* at 722-23. To develop this federalism-based "spheres of state legislative competence" analysis, the Court needs to provide more guidance on the "nature" of significant and relevant contacts. As Justice Powell noted in his *Allstate* dissent, "examination of contacts addresses whether 'the state has an interest in the application of its policy in this instance.'" *Allstate Ins. Co.*, 449 U.S. at 334-35 (internal cite omitted).

This is precisely the kind of guidance needed to resolve the issues in this case. The random application of the "public policy" doctrine, as in the Court of Appeals' decision in this case, distracts from the core analytical issues needed to resolve the nuanced FFC questions raised by this case. This Court could develop some categorical rules, analogous to the rule that the law of the state of incorporation controls. In *Modern Woodmen of America*, 267 U.S. at 551, Justice Holmes drew a parallel between membership in a fraternal benefit society and marriage: "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law granting the incorporation." The Court could conclude that marital domicile

should be accorded comparable status, with assurance that the choice of domicile of each marital partner be respected. That type of rule could control this case.

At this point, the specifics of the Court's guidance are less significant than the need for that guidance. This case provides a rich opportunity for the Court to clarify and develop the law of "significant contacts" in the context of FFC analysis, focusing on the "nature" of relevant contacts and perhaps staking out some bright-line rules analogous to the procedure vs. substance distinction or the state-of-incorporation doctrine for enforcement and interpretation of fraternal benefit society charters. Such guidance is especially needed since the Court has rejected balancing of sovereign interests across states as unworkable.

CONCLUSION

The FFC issues relating to the "public policy" doctrine are emerging and eventually will come to this Court cloaked in highly controversial garb. *See, e.g.*, Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STANFORD J. OF CIVIL RIGHTS & CIVIL LIBERTIES 1 (2005) (Harvard Law School Public Law, Research Paper No. 112, available at http://ssrn.com/abstract=697862). The "public policy" doctrine is in need of doctrinal clarification and development. This case provides an excellent vehicle and context for the development of that process.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 3, 2004 Session

IN RE: THE ESTATE OF J. D. DAVIS, DECEASED

Direct Appeal from the Circuit Court (Probate Division) for Davidson County No. 02P859 Frank G. Clement, Jr., Judge

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No. M2003-02614-COA-R3-CV

(Filed Sep. 02, 2004)

The probate court awarded summary judgment to Defendants/Appellees upon determining that, under Florida law, the antenuptial agreement entered into by Plaintiff/Appellant and Deceased was valid and enforceable. On appeal, Plaintiff/Appellant argues that the agreement is not enforceable as a violation of Tennessee public policy and by reason of duress. We reverse the award of summary judgment and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, J., joined.

Overton Thompson, III, Nashville, Tennessee, for the appellant, Dorothy L. Davis.

Thomas O. Helton and Sheri A. Fox, Chattanooga, Tennessee, for the appellees, J. Douglas Davis and Julie Ann Davis Griffin.

OPINION

This appeal requires us to construe an antenuptial agreement ("the agreement"). The facts relevant to our disposition of this appeal are undisputed. Plaintiff/Appellant, Ms. Dorothy L. Davis (Ms. Davis), a resident of Florida, and her late husband, J. D. Davis (Mr. Davis), a domiciliary of Tennessee, met in the spring of 1989 and married in July 1990. At the time of their marriage, Mr. Davis was 75 years of age and Ms. Davis was 66 years of age. Both Mr. Davis and Ms. Davis had been married previously, and both had children from their previous marriages. They were engaged for over a year before marrying, and their wedding date was postponed at least once. At the time of their marriage, both were in good health and were comfortable financially. They lived in Nashville, Tennessee, for six months of the year and in Florida for the remaining six months. Mr. Davis remained domiciled in Tennessee. Mr. Davis and Ms. Davis executed their antenuptial agreement at the offices of Mr. Davis' legal counsel in Florida on July 19, 1990, one day before their marriage. The agreement was notarized by a Florida notary.

The agreement executed by Mr. Davis and Ms. Davis provided, *inter alia*:

> 2. WAIVER OF RIGHT OF ELECTION. Each of the parties waives and releases any rights as surviving spouse to elect to take against the other's will, whether heretofore or hereafter made. This provision shall constitute a waiver and release of the right of election in accordance with the requirements of the Estates, Powers and Trusts Law of the State of Florida or of the

> same or similar law of any other jurisdiction which may be applicable.
>
> 3. RELEASE OF MARITAL RIGHTS. Each of the parties hereby waives and releases all rights and interest, statutory or otherwise, including by [sic] not limited to homestead, dower, spouse's allowance, statutory allowance, distribution in intestacy, and right of election to take against the will of each other which they might acquire as the wife, widow, husband, spouse, heir-at-law, next of kin, or distributee of each other, in their property, owned by them at the time of the marriage or acquired by them at any time thereafter.

Mr. Davis died on May 9, 2002, and his Will was admitted to probate in Tennessee on May 15, 2002. In December 2002, Ms. Davis filed petitions for elective share, homestead, exempt property, and a year's support allowance against the estate of Mr. Davis ("the Estate"). The Estate moved for summary judgment, arguing that Ms. Davis was not entitled to elect against Mr. Davis' Will under the antenuptial agreement. In her response, Ms. Davis argued the agreement was invalid and that she was, therefore, entitled to exercise her right to elective share, homestead, exempt property, and a year's support allowance.

The probate court determined that, under Tennessee's choice of law provisions, Florida law applied to the agreement. It further found the agreement to be valid and enforceable under Florida law. The probate court entered summary judgment for the Estate in April 2003, holding that, in light of the antenuptial agreement, Ms. Davis is not a "surviving spouse" within the meaning of section 31-4-101, Tennessee Code Annotated. Ms. Davis appeals.

Issues Presented

Ms. Davis presents the following issues, as we re-state them, for review by this Court:

(1) Whether the trial court erred by determining the antenuptial agreement is governed by Florida law;

(2) Whether the trial court erred by awarding summary judgment to the Estate where a genuine issue of material facts [sic] exists regarding whether the antenuptial agreement was a product of duress;

(3) Whether the trial court erred by awarding summary judgment to the Estate when enforcing it violates Tennessee public policy.

Standard of Review

Antenuptial agreements are enforceable as contracts. Tenn. Code Ann. § 36-3-501(2001). Contract interpretation is a matter of law which we review *de novo*, with no presumption of correctness afforded to the trial court. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); Tenn. R. App. P. 13(d). We also review an award of summary judgment *de novo*, with no presumption of correctness. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002).

Summary judgment is appropriate only when the moving party can demonstrate that there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The party moving for summary judgment must affirmatively negate an essential element of the nonmoving party's claim, or conclusively

establish an affirmative defense. *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998).

When a party makes a properly supported motion for summary judgment, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *Id.* A mere assertion that the nonmoving party has no evidence does not suffice to entitle the moving party to summary judgment. *Id.* In determining whether to award summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000). The court should award summary judgment only when a reasonable person could reach only one conclusion based on the facts and the inferences drawn from those facts. *Id.* Summary judgment is not appropriate if there is any doubt about whether a genuine issue of material fact exists. *McCarley*, 960 S.W.2d at 588.

Analysis

Absent a contractual choice of law provision, Tennessee courts apply the *lex loci* rule to contract causes of action. *Solomon v. FloWarr Mgmt.*, 777 S.W.2d 701, 704-05 (Tenn. Ct. App. 1989). Accordingly, the substantive law of the state in which the contract was executed governs disputes arising from the contract. *Id.* An exception to this general rule is often made when the contract is to be performed in another state and the parties envision performance in accordance with that state's laws. *Id.* at n5. The primary consideration to be made in determining whether the exception applies is whether the contract was made "in good faith with reference to the law of some other

state," or "with [a] view to" the other state. *Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 465, 466-67 (Tenn.1973) (quoting *First Am. Nat'l Bank of Nashville v. Automobile Ins. Co.*, 252 F.2d 62 (6th Cir. Tenn.1958)). The intent of the parties in this regard is to be "gathered from the terms of the instruments and all of the attending circumstances." *Id.*

The agreement before us in this case contains no choice of law provision. Thus, absent a reason for exception, the *lex loci* rule applies and this agreement is to be construed under Florida law. Ms. Davis submits, however, that a genuine issue of material fact exists regarding whether the parties intended that the agreement would be construed under Tennessee or Florida law.

Although Mr. Davis remained a domicile of Tennessee and identified Tennessee as his residence in tax returns and in his Will, there is nothing in this record to suggest that Mr. Davis intended that this agreement would be construed under Tennessee law. Mr. Davis entered into the agreement while in Florida; he entered into the agreement with a Florida domiciliary; the agreement was prepared by Florida legal counsel; during the marriage, Mr. Davis resided in Florida for one-half of each year. Additionally, Florida law is the only law specifically referenced in the agreement. Further, there is nothing in the record to suggest Ms. Davis believed the agreement would be construed under Tennessee law at the time she entered into it. Thus, absent some reason for exception, the *lex loci* rule would apply to this agreement, and it would be governed by Florida law.

Ms. Davis submits, however, that this contract is not enforceable because it violates Tennessee public policy. In

general, parties are free to contract under binding terms unless contrary to an overriding social policy. *Planters Gin Co. v. Federal Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 892 (Tenn. 2002). Thus, regardless of the generally applicable *lex loci* rule of contracts, courts will apply Tennessee law under circumstances where applying the law of a sister jurisdiction would contravene a strong public policy of Tennessee. *Bowman v. Price*, 226 S.W. 210, 214 (Tenn. 1920); *Robinson Prop. Group, LP v. Russell*, No. W2000-00331-COA-R3-CV, 2000 WL 331913 71, at *3 (Tenn. Ct. App. Nov. 22, 2000) (*no perm. app. filed*). A contract which violates Tennessee public policy will not be enforceable in Tennessee, although it is enforceable in the state in which it was executed. *Martin v. Dealers Transp. Co.*, 342 S.W.2d 245, 249 (Tenn. Ct. App. 1961).

Florida and Tennessee law governing antenuptial agreements differ in at least one important respect. In Tennessee, antenuptial agreements are enforceable as contracts if they have been entered into "freely, knowledgeably and in good faith without exertion of duress or undue influence upon either spouse." Tenn. Code Ann. § 36-3-501(2001); *Bratton v. Bratton*, 136 S.W3d 595, 599 (Tenn. 2004). Thus, to be valid in Tennessee, an antenuptial agreement requires prior adequate disclosure and the absence of undue influence or overreaching. *Bratton*, 136 S.W.3d at 599. A party seeking to enforce an antenuptial agreement in Tennessee must prove, by a preponderance of the evidence, that the agreement was executed after

> full and fair disclosure of the nature, extent and value of his or her holdings was provided to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent

> knowledge of the full nature, extent, and value of the proponent spouse's holdings.

Randolph v. Randolph, 937 S.W.2d 815, 817 (Tenn. 1996).

Tennessee applies the standard enunciated in *Randolph* in the probate context, as well as in the marriage dissolution context. *See In Re Estate of Miller*, C.A. No. 88-316-II, 1989 WL 19921, at *2 (Tenn. Ct. App. March 8, 1989). In *Estate of Miller*, this Court affirmed the judgment of the probate court setting aside the terms of an antenuptial agreement waiving the spouse's marital rights, including a year's support, exempt property, homestead and a distributive share of the net estate. We held the agreement was invalid where the agreement was not entered into freely, knowledgeably and in good faith after full and fair disclosure. *Id.*

Under Florida law, however, an antenuptial agreement may be held valid in the probate context even when executed under conditions which would render it invalid in a marriage dissolution action. *Weintraub v. Weintraub*, 417 So.2d 629, 630 (Fla. 1982). The Florida Code provides:

> **Waiver of Spousal Rights.**
>
> (1) The rights of a surviving spouse to an elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate or any of those rights, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses. The requirement of witnesses shall be applicable only to contracts, agreements, or waivers signed by Florida residents after the effective date of this

law. Any contract, agreement, or waiver executed by a nonresident of Florida, either before or after this law takes effect, is valid in this state if valid when executed under the laws of the state or country where it was executed, whether or not he or she is a Florida resident at the time of death. Unless the waiver provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate, by the waiving party in the property of the other and a renunciation by the waiving party of all benefits that would otherwise pass to the waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver.

(2) Each spouse shall make a fair disclosure to the other of that spouse's estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage.

(3) No consideration other than the execution of the agreement, contract, or waiver shall be necessary to its validity, whether executed before or after marriage.

Fla. Stat. Ann. § 732.702(2002). Thus, in the Florida probate context, an antenuptial agreement to waive the right of election is valid even in the absence of full and fair

disclosure of the estate. A fair disclosure is required only when such an agreement is executed after marriage.

As we consider whether enforcing the agreement as valid under Florida law would violate Tennessee public policy, we must consider the history of Florida law governing antenuptial agreements. The Supreme Court of Florida addressed the validity of antenuptial agreements in the probate context in *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962). The *Del Vecchio* court observed:

> The relationship between the parties to an antenuptial agreement is one of mutual trust and confidence. Since they do not deal at arm's length they must exercise a high degree of good faith and candor in all matters bearing upon the contract.

Del Vecchio, 143 So.2d at 21. In consideration of this confidential relationship, the court held that, in the probate context:

> A valid antenuptial agreement contemplates a fair and reasonable provision therein for the wife, or, absent such provision, a full and frank disclosure to the wife, before the signing of the agreement, of the husband's worth, or, absent such disclosure, a general and approximate knowledge by her of the prospective husband's property. The term 'approximate' is, for this purpose, held synonymous with 'near', 'close to' or 'approaching'.
>
> If the provision made by the agreement is not fair and reasonable then it should be made to appear that the wife, when she signed, had some understanding of her rights to be waived by the agreement. In any event she must have signed

> freely and voluntarily, preferably, but not necessarily a required pre-requisite, upon competent and independent advice.

Id. at 20. In *Posner v. Posner*, the Supreme Court of Florida held the *Del Vecchio* standard of fairness of provision or knowledge of the estate was applicable to determine the validity of antenuptial agreements in marriage dissolution actions. *Posner v. Posner*, 233 So.2d 381 (Fla. 1970).

In 1974, however, the Florida legislature enacted current section 732.702(2), changing the *Del Vecchio* rule as it applied to the probate context. *Weintraub*, 417 So.2d 629, 630 (Fla. 1982). Accordingly, under Florida law, an antenuptial agreement is valid in the probate context even absent disclosure or independent knowledge of the estate of the other spouse. *Id.* The Florida statute applies only in the probate context, however, and the *Weintraub* court rejected Appellant's argument that, for public policy reasons, the same rule should apply in marital dissolution actions. *Id.* at 631. The *Weintraub* court observed that the Florida legislature had made a policy determination when it revised the *Del Vecchio* rule in the probate context, and that it was within the province of the legislature to revise the rule, if it saw fit, in the dissolution context. *Id.* The court further stated, "[t]his Court, however, believes that the *Posner* decision serves an important function in protecting prospective spouses from being bound by unfair agreements[.]" *Id.*

Unlike the Florida legislature, the Tennessee legislature has made no distinction or exception for antenuptial agreements which ultimately are construed in the probate context. In Tennessee, an antenuptial agreement must be entered into "freely, knowledgeably and in good faith

without exertion of duress or undue influence upon either spouse" in order to be valid in any context. Tenn. Code Ann. § 36-3-501(2001). The courts of Tennessee, moreover, have applied the standard with the same rigor in both the probate and dissolution contexts. *See, e.g., In Re Estate of Miller*, C.A. No. 88-316-II, 1989 WL 19921, at *2 (Tenn. Ct. App. March 8, 1989).

In *Bratton v. Bratton*, 136 S.W.2d 595 (Tenn. 2004), the Tennessee Supreme Court recently reiterated the philosophy which guides the courts of this state when considering agreements entered into between spouses. In considering a postnuptial agreement, the *Bratton* court stated, "[b]ecause of the confidential relationship which exists between husband and wife, postnuptial agreements are [like antenuptial agreements] . . . subjected to close scrutiny by the courts to ensure that they are fair and equitable." *Bratton*, 136 S.W.3d at 601. The court observed that "a fiduciary duty of the highest degree" is imposed in transactions between spouses. *Id.* (quoting 41 C.J.S. *Husband & Wife* § 87 (1991)). The *Bratton* court emphasized:

> While it is lawful and not against public policy for husband and wife to enter into such contracts, yet they are not dealing with each other as strangers at arm's length. The relationship of husband and wife is one of special confidence and trust, requiring the utmost good faith and frankness in their dealings with each other. . . . Transactions of this character are scrutinized by the courts with great care, to the end that no unjust advantage may be obtained by one over the other by means of any oppression, deception, or fraud. Courts of equity will relieve against any unjust advantage procured by any such means, and less

> evidence is required in such cases to establish the fraud, oppression, or deception than if the parties had been dealing at arm's length as strangers. . . .

Id. (quoting *In re Estate of Gab*, 364 N.W.2d 924, 926 (S.D.1985) (quoting *Keith v. Keith*, 37 S.D. 132, 156 N.W. 910, 911 (1916))).

Clearly, in Tennessee, the marriage relationship is regarded as one of utmost confidence. Accordingly, it is the public policy of this state that agreements entered into between spouses or, in the case of antenuptial agreements, prospective spouses, are enforceable only if they are executed in good faith, knowledgeably, and without duress. *Id.*; Tenn. Code Ann. § 36-3-501 (2001). This "highest degree" of fiduciary duty is required in light of the confidential relationship existing between the parties at the time the agreement is made. The fact that a term of the agreement takes effect after the death of one spouse, rather than upon a dissolution of the marriage, does not change the circumstances existing at the time the agreement was executed by the parties.

Tennessee's requirements for antenuptial agreements have been developed in light of the unique and confidential nature of the marriage relationship. "An engagement to marry creates a confidential relation between the contracting parties and an antenuptial agreement contract entered into after the engagement and during its pendency must be attended by the utmost good faith[.]" *Bratton*, 136 S.W.3d at 601 (quoting *Baker v. Baker*, 142 S.W.2d 737, 745 (Tenn. 1940)). Borrowing the now famous words of Judge Cardozo, the parties to an antenuptial agreement are "coadventures, subject to fiduciary duties akin to those of partners . . . the punctilio of an honor the most sensitive, is

then the standard" which we shall apply to their agreements. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). The relationship existing at the time the agreement was executed is not altered by the context in which enforcement is sought.

The public policy of this state is found in our constitution, statutes, judicial decisions, and common law. *Alcazar v. Hayes*, 982 S.W.2d 845, 851 (Tenn. 1998). It is primarily within the function of the legislature to determine public policy, although the judiciary may do so in the absence of a constitutional or statutory directive. *Id.* Antenuptial agreements generally are favored by public policy. *Bratton*, 136 S.W.3d 599. However, the public policy of this state, as established by the legislature and enforced by the courts, requires that, in light of the confidential relationship between prospective spouses, antenuptial agreements must be *executed* in utmost good faith, knowledgeably, with full and fair disclosure, and without duress. Unlike the Florida legislature, the Tennessee legislature has not altered the rules governing the execution of antenuptial agreements when enforcement is in the probate context.

At the time he entered into the agreement, Mr. Davis was a domiciliary of Tennessee. He remained a domiciliary of Tennessee, and thus, upon his death, his Will was subject to probate in Tennessee courts. The parties to this action do not dispute that the Davises' antenuptial agreement was entered into by the parties without full and fair disclosure. Further, the Estate does not contend that Ms. Davis had independent knowledge of Mr. Davis' estate when the agreement was executed. Thus, in this case, the Estate seeks to enforce a contractual term which violates Tennessee public policy in a probate proceeding which could occur only in Tennessee.

As a matter of public policy, Tennessee requires full and fair disclosure. This policy has been formed by the legislature and reinforced by the courts of this state. It is a policy developed in light of the unique and confidential nature of the marital relationship, and serves to promote the highest degree of fiduciary duty between spouses. With all due respect to the legislature of Florida, section 732.702 of the Florida code violates a substantially important public policy of the State of Tennessee. Therefore, we decline to apply the *lex loci* rule to this agreement. The agreement will be construed under Tennessee substantive law. This holding is dispositive of this appeal and the issue of duress is pretermitted.[1]

Holding

In light of the foregoing, we hold the antenuptial agreement executed by Ms. Davis and the late Mr. Davis is unenforceable in Tennessee. Accordingly, we reverse the award of summary judgment to the Estate and remand this action for further proceedings consistent with this opinion. Costs of this appeal are taxed to the Appellees, J.

---

[1] Although our holding on the issue of public policy makes it unnecessary for us to address the issue of duress, we note that the record and Appellant's brief create confusion regarding the date of the Davises' marriage. This fact would have been important in our consideration of duress. We note, however, that counsel for the Appellees informs the Court: "The Record below reflects some confusion over the date of marriage; however, the marriage license and antenuptial agreement show that the parties were married in 1990." We highly commend Appellees' counsel for their candor and forthrightness to this Court.

Douglas Davis and Julie Ann Davis Griffin, Co-Executors, for which execution may issue if necessary.

/s/ David R. Farmer
DAVID R. FARMER, JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 3, 2004 Session

IN RE: THE ESTATE OF J. D. DAVIS, DECEASED

Circuit Court (Probate Division) for
Davidson County
No. 02P859

No. M2003-02614-COA-R3-CV

JUDGMENT

(Filed Sep. 02, 2004)

This cause came on to be regularly heard and considered by this Court, and for the reasons stated in the Opinion of this Court, of even date, it is Ordered:

1. The judgment of the trial court is reversed and remanded for further proceedings consistent with this opinion.

2. Costs of this appeal are taxed against the appellees J. Douglas Davis and Julie Ann Davis Griffin, Co-Executors, for which execution may issue if necessary.

PER CURIAM

IN THE SEVENTH CIRCUIT COURT
(PROBATE DIVISION)
DAVIDSON COUNTY,
TWENTIETH JUDICIAL DISTRICT
STATE OF TENNESSEE

DOROTHY L. DAVIS, Petitioner/Surviving Spouse, v. J. DOUGLAS DAVIS and, JULIE ANN DAVIS GRIFFIN, Co-executors under the Last Will and Testament of J.D. Davis, deceased, Respondents.	)	No. 02P859

ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 23, 2003)

On March 28, 2003, this Court heard oral argument on the Motion for Summary Judgment filed by J. Douglas Davis and Julie Ann Davis Griffin ("Respondents"). Based upon the pleadings, argument of counsel, and the entire record in this case, this Court finds as follows:

Dorothy L. Davis ("Petitioner") was a resident of Florida at the time of her marriage to J. D. Davis ("Decedent"); Petitioner and Decedent's marriage license was issued by the State of Florida; Petitioner and Decedent's marriage occurred in Florida; and Petitioner and Decedent lived in Florida for at least part of the time during their marriage;

Under Tennessee choice of law provisions, the substantive law of the State of Florida applies to determine the validity of the Antenuptial Agreement ("Agreement") executed by Petitioner and Decedent;

The Agreement is valid and enforceable under Florida law;

Because Petitioner and Decedent entered into a valid and enforceable antenuptial agreement, Petitioner is not a "surviving spouse" within the meaning of Section 31-4-101, *Tennessee Code Annotated*;

Because Petitioner is not a "surviving spouse," she is not entitled to an elective share, homestead, exempt property, or a year's support allowance from the Estate of J. D. Davis; and

The Agreement constitutes a complete waiver by Petitioner of any interest in the Estate of J. D. Davis beyond that which is provided for under the terms of the Last Will and Testament of J. D. Davis.

Based upon the foregoing findings of fact and conclusions of law, the pleadings, argument of counsel, and the entire record, this Court finds that there is no genuine issue of material fact with regard to Petitioner's claims for elective share, homestead, exempt property, and a year's support allowance, and that Respondents are entitled to summary judgment on those claims as a matter of law.

Accordingly, Respondents' Motion for Summary Judgment is **GRANTED** and it is hereby

ORDERED that Petitioner's claims for elective share, homestead, exempt property, and a year's support allowance and all matters currently pending before this Court

concerning those claims be dismissed with prejudice. It is further

ORDERED that costs be taxed against Petitioner.

Entered this 23, day of April, 2003.

/s/ Frank G. Clement, Jr.
Honorable Frank G. Clement, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been hand delivered and mailed, postage prepaid, to the following, this 14 day of April, 2003.

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C-1

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: THE ESTATE OF J. D. DAVIS

No. M2003-02614-SC-R11-CV

ORDER

(Filed Feb. 28, 2005)

Upon consideration of the application of J. Douglas Davis and Julie Ann Davis Griffing [sic] for permission to appeal and the record before us, the application is denied.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: THE ESTATE OF J. D. DAVIS

No. M2003-02614-SC-R11-CV

ORDER

(Filed May 2, 2005)

Upon consideration of the Petition for Rehearing of the February 28, 2005, order denying the application for permission to appeal of J. Douglas Davis and Julie Ann Davis Griffin and the record before us, the petition is denied.

The Motions of Dorothy L. Davis to strike petition for rehearing and of J. Douglas Davis and Julie Ann Davis Griffin to strike the motion to strike petition for rehearing are denied.

PER CURIAM

U.S. Const. Art. IV § 1

Section 1. Full Faith and Credit

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

---

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Tenn. Code Ann. § 36-3-501 (2005)

36-3-501. Enforcement of antenuptial agreements

Notwithstanding any other provision of law to the contrary, except as provided in § 36-3-502, any antenuptial or prenuptial agreement entered into by spouses concerning property owned by either spouse before the marriage which is the subject of such agreement shall be binding upon any court having jurisdiction over such spouses and/or such agreement if such agreement is determined, in the discretion of such court, to have been entered into by such spouses freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse. The terms of such agreement shall be enforceable by all remedies available for enforcement of contract terms.

Fla. Stat. Ann. § 732.702. Waiver of spousal rights

(1) The rights of a surviving spouse to an elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate or any of those rights, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses. The requirement of witnesses shall be applicable only to contracts, agreements, or waivers signed by Florida residents after the effective date of this law. Any contract, agreement, or waiver executed by a nonresident of Florida, either before or after this law takes effect, is valid in this state if valid when executed under the laws of the state or country

where it was executed, whether or not he or she is a Florida resident at the time of death. Unless the waiver provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate, by the waiving party in the property of the other and a renunciation by the waiving party of all benefits that would otherwise pass to the waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver.

(2) Each spouse shall make a fair disclosure to the other of that spouse's estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage.

(3) No consideration other than the execution of the agreement, contract, or waiver shall be necessary to its validity, whether executed before or after marriage.

ANTE-NUPTIAL AGREEMENT

AGREEMENT made this 19th day of July, 1990 between DOROTHY TAYLOR of West Palm Beach, Fl, and J. D. DAVIS of Nashville, Tennessee.

WHEREAS the parties to this agreement intend to be married in the immediate future, and

WHEREAS each of the parties owns individually real and/or personal property, the nature and extent of the holdings of each party having been disclosed to the other, and

WHEREAS the parties desire that all property now owned or hereafter acquired by each of them shall, for testamentary disposition, be free from any claim of the other that may arise by reason of their contemplated marriage.

It is therefore agreed:

1. PROPERTY TO BE SEPARATELY OWNED. After the solemnization of the marriage between the parties, each of them shall separately retain all rights in his or her own property, whether now owned or hereafter acquired, and each of them shall have the absolute and unrestricted right to dispose of such separate property, free from any claim that may be made by the other by reason of their marriage, and with the same effect as if no marriage had been consummated between them.

2. WAIVER OF RIGHT OF ELECTION. Each of the parties waives and releases any rights as surviving spouse to elect to take against the other's will, whether heretofore or hereafter made. This provision shall constitute a waiver and release of the right of election in accordance with the

requirements of the Estates, Powers and Trusts Law of the State of Florida or of the same or similar law of any other jurisdiction which may be applicable.

3. RELEASE OF MARITAL RIGHTS. Each of the parties hereby waives and releases all right and interest, statutory or otherwise, including but not limited to homestead, dower, spouse's allowance, statutory allowance, distribution in intestacy, and right of election to take against the will of each other which they might acquire as the wife, widow, husband, spouse, heir-at-law, next of kin, or distributee of each other, in their property, owned by them at the time of the marriage or acquired by them at any time thereafter.

4. SEPARATE PROPERTY. Except as herein otherwise provided each of the parties shall have the absolute right to manage, dispose of, or otherwise deal with any property now separately owned, or hereafter separately acquired, in any manner whatsoever.

5. TRANSFERS BETWEEN THE PARTIES. Notwithstanding the provisions of this agreement, either party shall have the right to transfer or convey to the other any property or interest therein which may be lawfully conveyed or transferred during his or her lifetime or by will or otherwise upon death, and neither party intends by this agreement to limit or restrict in any way the right and power to receive any such transfer or conveyance from the other. However, the parties acknowledge that no promises of any kind have been made by either of them to the other with respect to any such right.

6. Each party during his or her lifetime shall keep and retain sole ownership, control and enjoyment of all his

or her property, real and personal, free and clear of any claim of the other.

7. WAIVER OF ALIMONY. Each of the parties hereby waives and releases all right and interest, statutory or otherwise, that they may now have, or in the future have, for any alimony.

8. NECESSARY DOCUMENTS. Each party shall, upon the request of the other, execute, acknowledge, and deliver any additional instruments that may be reasonably required to carry the intention of this agreement into effect, including such instruments as may be required by the laws of any jurisdiction, now in effect or hereafter enacted, which may affect the property right of the parties as between themselves or with others.

9. EFFECTIVE DATE. This agreement shall take effect only upon the solemnization of the marriage now contemplated by the parties.

10. CONSIDERATION. The consideration for this agreement is the marriage contemplated by the parties, and the mutual promises contained therein.

11. COMPLETENESS. This agreement contains the entire understanding of the parties, and no representations or promises have been made except as contained herein.

12. BENEFIT. This agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors, and assigns.

IN WITNESS WHEREOF the parties have signed, sealed and acknowledged this agreement.

/s/ Dorothy Tyalor (L.S.)
Dorothy Taylor

J.D. Davis (L.S.)
J.D. Davis

WITNESSES:

/s/ J[Illegible] Nemez

/s/ Ray Greenberg

STATE OF FLORIDA

COUNTY OF PALM BEACH

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, DOROTHY TAYLOR and J.D. DAVIS, to me well known and known to me to be the individuals described in and who executed the foregoing instrument; and they acknowledged before me that they executed the same freely and voluntarily for the purposes therein expressed.

WITNESS my hand and official seal at West Palm Beach, County of Palm Beach, State of Florida, this 19th day of July, 1990.

/s/ J[Illegible] Nemez
Notary Public

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. DEC 27, 1990
BONDED THRU GENERAL INS. UND.

(2)

No. 05-162

Supreme Court, U.S.
FILED
SEP 30 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ESTATE OF J. D. DAVIS AND J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS,

Petitioners,

v.

DOROTHY L. DAVIS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee, Middle Section At Nashville

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners Have Satisfied the Jurisdictional Requirements of 28 U.S.C. § 1257(a).

II. Whether Petitioners Have Complied with the Mandate of Supreme Court Rule 14.1(g)(i).

III. Whether Tennessee Has a Significant Aggregation of Contacts with This Matter So That Application of Its Law Is Constitutionally Permissible Under the Court's Recent Unanimous Decision in *Franchise Tax Board v. Hyatt*.

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JURISDICTION

Because of Petitioners' failure to comply with 28 U.S.C. § 1257(a) and Supreme Court Rule 14.1(g)(i), this Court lacks jurisdiction.

STATEMENT OF THE CASE

This case raises no substantial federal question. No matter of pressing national concern is involved. At issue is simply the question of what portion of the Tennessee estate of J.D. Davis, a Tennessee domiciliary, should be distributed to his children from his first marriage and what portion should be distributed to his widow, a Tennessee resident at his death and to whom he was married for nearly twelve years until he died on May 9, 2002. The children from the prior marriage are co-executors of Mr. Davis' estate and are Petitioners. Dorothy Davis, J.D. Davis' widow, is the Respondent to the petition.

Petitioners argued in the state courts of Tennessee that Mrs. Davis waived the statutory rights granted by Tennessee law to a surviving spouse by executing an antenuptial agreement in Florida on July 19, 1990. They asserted that Tennessee is required to apply its usual choice of law contract rule of *lex loci contractus*, unless fundamental public policies of Tennessee would be offended. Petitioners allowed that under the Full Faith and Credit Clauses of the United States and Tennessee Constitutions that Tennessee could apply its own law if its public policy would be truly offended. However, they contended that Tennessee public policy had not been truly offended. Accordingly, the public policy exception to *lex loci contractus* was not justified in this case and Florida law had to be applied. Unlike Tennessee law, Florida law does not require full and fair disclosure prior to the execution of an antenuptial agreement.

Mrs. Davis argued that the antenuptial agreement was not valid because there is a fundamental and well-established Tennessee public policy that bars a waiver of a surviving spouse's statutory rights unless those rights are "knowledgeably" waived. This public policy is embodied in Tenn. Code Ann. § 36-3-501 as well as numerous Tennessee Supreme Court and Court of Appeals decisions. As there was no disclosure by Mr. Davis of his finances and Mrs. Davis had no independent knowledge, the requirement that the waiver be made "knowledgeably" had not been satisfied.

Mrs. Davis also claimed that she had signed the antenuptial agreement under duress, a basis for invalidity under both Tennessee and Florida law. She had been taken to the office of decedent's attorney just one day before the marriage, did not have her own attorney present, was told by the decedent to trust him and that "there was nothing to worry about," and after being coerced into signing had not seen the agreement or a copy again until shortly before her husband's death more than eleven years later. R. vol. II, at 170-72.

The Seventh Circuit Court (Probate Division), Davidson County, Tennessee (the "Probate Court"), on a motion for summary judgment by Petitioners, held in favor of Petitioners. Pet. App. B-1 to B-4. On appeal, the Tennessee Court of Appeals unanimously reversed and remanded for further proceedings consistent with its opinion. Pet. App. A-1 to A-17. The Tennessee Supreme Court subsequently denied Petitioners' petition for permission to appeal, Pet. App. C-1, and also denied their petition for a rehearing of the denial for permission to appeal. Pet. App. D-1.

The opinion of the Tennessee Court of Appeals makes clear that antenuptial agreements are treated differently under Tennessee law than are ordinary commercial contracts. The public policy of the state seeks to encourage

"the highest degree of fiduciary duty between spouses," Pet. App. A-15, and requires, in pursuit of that policy, that antenuptial agreements "must be *executed* in utmost good faith, knowledgeably, with full and fair disclosure, and without duress," Pet. App. A-14. Furthermore, Tennessee has a significant interest in the matter as "the Estate seeks to enforce a contractual term which violates Tennessee public policy in a probate proceeding which could occur only in Tennessee." *Id.*

In reaching its decision, the Tennessee Court of Appeals was not unmindful of or insensitive to the law of the sister state of Florida. The Court carefully analyzed the genesis of the unique approach of Florida, the only state in the country which requires a knowing waiver if statutory rights upon *divorce* are involved, but imposes no such requirement if a waiver of statutory rights is asserted in the *probate* context. The Court explained: "With all due respect to the legislature of Florida, section 732.702 of the Florida code violates a substantially important public policy of the State of Tennessee. Therefore, we decline to apply the *lex loci* rule to this agreement." Pet. App. A-15. Because of its decision on public policy grounds, the Court of Appeals held that the issue of duress was pretermitted. *Id.*

A review of the Record reveals that Tennessee has a significant aggregation of contacts with this matter. The decedent grew up in Tennessee, lived in Tennessee, and died a domiciliary of the state. Virtually his entire estate was situated in Tennessee at his death. Petitioners offered decedent's will for probate exclusively in Tennessee and sought appointment as his personal representatives solely in Tennessee and in no other state. At the time of decedent's death his surviving spouse, Mrs. Davis, was a resident of *Tennessee*. If the waiver at issue here is, indeed, invalid, then Mrs. Davis will be entitled to take a portion of her husband's *Tennessee* estate pursuant to

statutory rights granted by *Tennessee* law. If the waiver is valid, then Mrs. Davis will be denied statutory rights granted under *Tennessee* law to a surviving spouse of a *Tennessee* domiciliary decedent in that decedent's *Tennessee* estate. The waiver does not exist in a vacuum. It has no practical significance except as it affects how the *Tennessee* estate of a *Tennessee* domiciliary is distributed. Property in no other state will be affected. The waiver only impacts Tennessee's system of inheritance.

The current posture of this case leaves no doubt that review by this Court would be premature and beyond the Court's jurisdiction under 28 U.S.C. § 1257(a). Presently, there is no final judgment. There are pending state court proceedings in Tennessee as well as in Florida. Indeed, counsel for Petitioners has only recently admonished counsel for Mrs. Davis that "we do not agree that the claims of Dorothy Davis are finally resolved in her favor" and has explained that the production of certain documents did not waive "any rights claims, setoffs, counterclaims or other actions and recourses available to the Executors for the benefit of the Estate." Resp. App. A-1. In even more recent correspondence, counsel for Petitioners has reasserted in writing that Petitioners do not consider the claims finally resolved. Resp. App. B-1. Furthermore, by an Order dated August 26, 2005, the Tennessee Court of Appeals refused to exercise its discretion and withdraw its mandate so as to stay further proceedings pending this Court's consideration of the petition, as was requested by Petitioners. Resp. App. C-1. Accordingly, the parties are currently proceeding with discovery in the ongoing Tennessee litigation.

In addition to the ongoing proceedings in Tennessee, just ten days before filing their petition in this Court, Petitioners filed a complaint on July 20, 2005 in the Circuit Court for the Fifteenth Judicial Circuit of Palm Beach County, Florida. Resp. App. D-1 to D-9. The complaint

seeks, *inter alia* to compel Mrs. Davis to abandon her claim and in the alternative to recover from Mrs. Davis in Florida any amount that she might receive from the decedent's estate in Tennessee. Petitioners have been enjoined by the Probate Court of Davidson County, Tennessee, from pursuing their Florida action while the petition is being reviewed by this Court. Resp. App. E-3 to E-4. Mrs. Davis believes there is absolutely no merit to the action, nor even the right of Petitioners to bring it in Florida. However, the Probate Court has refused for now to order Petitioners to withdraw the Florida complaint. Resp. App. E-4. Meanwhile, Mrs. Davis filed a motion on September 26, 2005 seeking an indefinite extension of time to file an answer. Resp. App. F-1. At the date of submission of this brief, the Florida Circuit Court has not yet ruled. Thus, there are pending actions in two state courts involving the dispute between Petitioners and Mrs. Davis over the distribution of the Tennessee estate of the decedent.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE JURISDICTIONAL REQUIREMENTS OF 28 U.S.C. § 1257(a) HAVE NOT BEEN SATISFIED

Under 28 U.S.C. § 1257(a), Supreme Court review of state court decisions is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." *See also Florida v. Thomas*, 532 U.S. 774, 777 (2001); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306 (1989). As this Court stated in *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (Ginsburg, J.), "the finality rule 'is not one of those technicalities to be easily scorned.' It is an important factor in the smooth working of our federal system." The

state court decision can only be reviewed if it is final in two respects: "it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Id. See also Market St. Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it" and will not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

In the present case, Petitioners prematurely seek review by this Court. There are five important grounds for concluding that the finality rule of 28 U.S.C. § 1257(a) has not been satisfied.

A. Petitioners Have on Multiple Occasions Asserted in Writing That Mrs. Davis' Claims Have Not Yet Been Finally Resolved

Shortly before filing their petition in this Court, Richard Bird, counsel for Petitioners, wrote on June 28, 2005, in a letter to Mrs. Davis' counsel:

> In response to your letter of May 17, 2005 and the more recent letters, *we do not agree that the claims of Dorothy Davis are finally resolved in her favor*. This response and the information furnished are without waiving any rights, claims, defenses, setoffs, counter-claims or other actions and recourses available to the Executors for the benefit of the Estate.

Resp. App. A-1 (emphasis added).

Mr. Bird reiterated Petitioners' stance in another letter dated July 20, 2005: "As I have advised in previous

correspondence, it is not considered that the claims of Dorothy Davis against the estate are finally resolved." Resp. App. B-1.

This Court should take Petitioners' written concessions as to the lack of finality at face value. Petitioners clearly believe that they have "rights, claims, defenses, setoffs, counter-claims or other actions and recoveries available" which could only be raised in state court and not before this Court. To date they have demonstrated every intention of pursuing remaining avenues in state court, as is evidenced by the recent filing of a complaint in Florida Circuit Court.

B. The Controversy Is Still Being Litigated in the State Courts of Florida and Tennessee

On July 19, 2005, only ten days before filing their petition in this Court, Petitioners filed a complaint in the Circuit Court for the Fifteenth Judicial Circuit In and For Palm Beach County, Florida. Resp. App. D-1 to D-9. The complaint sets forth counts for money damages, specific performance, and declaratory judgment. The prayer for relief requests a determination by the court (i) that the antenuptial agreement is valid and enforceable, (ii) that Mrs. Davis has no right to pursue her statutory rights in Tennessee, (iii) that she be ordered to execute a waiver of all such rights and dismiss her "pending" Tennessee claims, and (iv) that if Mrs. Davis recovers in Tennessee that she be required to turn over to Petitioners monetary damages "in the amount of [her] recovery for elective share, homestead, exempt property, and a years' [sic] support allowance." *Id.* at D-9.

In the event the Florida court were to rule in Petitioners' favor, the practical consequence would be the denial of the Tennessee statutory rights that Mrs. Davis claims. Were this to occur, Petitioners would not require review by

this Court. On the other hand, Mrs. Davis might well challenge the jurisdiction of the Florida court and also raise a host of procedural and substantive arguments, including the question pretermitted by the Tennessee Court of Appeals as to whether she signed the antenuptial agreement under duress. Pet. App. A-15. Mrs. Davis might eventually petition this Court with her own Full Faith and Credit claim, although it would be of a very different sort from the one being asserted now by Petitioners.

On the other hand, if Petitioners were barred from pursuing their claims in Florida by the Tennessee courts, which exercise supervisory authority over them, or if Petitioners were allowed to proceed but then lost in the Florida courts, they could at that point petition this Court and raise the very same federal question they are presently raising. There might be finality at that time, unlike now. Accordingly, this Court should not grant the petition prematurely when the ultimate shape of the litigation and the nature of the decisive federal question is not yet clear.

C. When a Decision of a Lower State Court Is Reversed and Remanded for Proceedings Consistent with the Opinion, as in This Case, the State Court Judgment Is Not Yet Final

The Tennessee Court of Appeals reversed the summary judgment granted by the Probate Court and remanded "for further proceedings consistent with this opinion." Pet. App. A-15. Accordingly, the judgment of the Court of Appeals is not final for purposes of the Supreme Court's jurisdiction under 28 U.S.C. § 1257(a). *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). As was previously discussed, to be

final, a judgment must be final in two respects: "it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of the final court." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (quoting *Market Street Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945)). *See also Collins v. Miller*, 252 U.S. 364, 370 (1920) (the judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all causes of action involved").

The dispute between Petitioners and Mrs. Davis simply does not meet these criteria. As has been discussed, there are currently proceedings in the Circuit Court for the Fifteenth Judicial Circuit In and For Palm Beach County, Florida, and in the Probate Court, Davidson County, Tennessee. The Tennessee Court of Appeals' decision, under these circumstances, cannot be said to be "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." It certainly is not "the final word of the final court."

Indeed, this Court has routinely held that the need to determine damages or other appropriate relief on remand means that the determination of the state courts is not yet final, even if the federal question is not likely to arise again in the proceedings. *See, e.g., Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948); *Houston v. Moore*, 16 U.S. (3 Wheat) 433, 434 (1818); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 632-33 (1981); *O'Dell v. Espinoza*, 456 U.S. 430 (1982). Likewise, when an accounting remains, a state court determination of the federal question is not final, except when the state court has ordered an immediate transfer of property causing irreparable harm. *See, e.g., Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948) ("an order decreeing immediate transfer of possession of physical property is

final for purposes of review .... But [a taking] ... where the amount of compensation has not been determined, is not deemed final, certainly where the property will not change hands until after the award of compensation"). No such immediate transfer of property has been ordered by the Tennessee Court of Appeals.

If a trial court only has ministerial acts to fulfill on remand, there is finality to the appellate court judgment. *See, e.g., Department of Banking v. Pink,* 317 U.S. 264, 267 (1942). However, that is not the case here. Apart from the counterclaims, setoffs and other defenses that Petitioners assert are still available and, in fact, are pursuing in the *state* courts of Florida, vital determinations remain to be made in the Davidson County Probate Court in Tennessee: the assets constituting the estate; the value of the decedent's estate; whether assets transferred during life should be included for elective share purposes; whether assets should be liquidated to satisfy the elective share in cash; the style of living of the Davises at the decedent's death for purposes of determining the statutory year's allowance; and the personal property of her husband to which Mrs. Davis is entitled under the exempt property statute. These are not ministerial acts and demonstrate that the Probate Court's summary judgment was merely an interlocutory or intermediate step in the estate litigation.

D. The Federal Question Raised in the Petition Had Not Been Previously Raised in the State Courts

In order for the United States Supreme Court to exercise jurisdiction under 28 U.S.C. § 1257(a), a substantial federal question must have been properly raised in the state courts. *See, e.g., Zucht v. King,* 260 U.S. 174, 176 (1922). One important reason for insisting that state

courts be given the first opportunity to pass on federal claims is the Court's oft-repeated acknowledgment of state court competence to adjudicate federal constitutional claims. *See, e.g., Allen v. McCurry,* 449 U.S. 90, 105 (1980). *See also* Robert L. Stern et al., *Supreme Court Practice* 169 (8th ed. 2002). This principle of state court competence is invested with so much importance by the Court that it has held that "[b]y failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court." *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 483 n.16 (1983). As stated in this Court's recent decision in *Adams v. Robertson,* 520 U.S. 83, 90 (1997), "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider."

For these reasons, the Supreme Court has held on numerous occasions that the petitioner has the "high burden" of establishing that the federal question was properly raised, so that the failure of the state court to deal with it was not for want of proper presentation. *See, e.g., Campbell v. Louisiana,* 523 U.S. 392, 403 (1998); *Adams v. Robertson,* 520 U.S. 83, 86 (1997).

In their briefs before the Tennessee Court of Appeals and the Tennessee Supreme Court, Petitioners did, in fact, raise a Full Faith and Credit claim. However, it was a strikingly different Full Faith and Credit claim than the claim raised in their present petition before this Court. Accordingly, neither the state courts of Tennessee nor Mrs. Davis were ever given an opportunity to address the federal constitutional claim in the prior state proceedings and had no reason to anticipate it.

In its most recent decision on the issue, this Court emphasized the requirement that the federal claim must

have been presented in the state courts with "fair precision and in due time." *Adams v. Robertson,* 520 U.S. 83, 88 (1997). Important policies are served by this requirement, which is alternatively cast as jurisdictional or prudential, but if the latter, entitled to no less respect. *Id.* at 90. By requiring state court consideration of the claim first, the interest of comity is served and the possibility of resolution on alternative state grounds is fostered, thereby avoiding unnecessary Supreme Court adjudication. Furthermore, it assures the creation of a more adequate factual and legal record in the Supreme Court, and permits the parties to test and refine their positions, thus enhancing the Court's own understanding.

In *Adams,* petitioners had raised in a heading of an argument in their brief in state court the argument made in their petition for writ of certiorari, that minimum due process required that class members be permitted to opt out of a class. However, the discussion under the heading in their state court brief only addressed due process in the sense of the lack of personal jurisdiction over out-of-state class members. For that reason, the Court denied their petition.

In the Tennessee Court of Appeals in the present case, Petitioners actually took the position, without reservation, that Tennessee could apply its law based on its own public policy. Petitioners simply argued that "[b]efore declaring a contract void on public policy grounds, a court must determine that no doubt exists that enforcing the contract would clearly prejudice the public interest" when applied to the particular facts. Pet. Br. in Tenn. Ct. App. 14, 19. They argue in their brief before this Court precisely the contrary, that a forum-centered analysis is constitutionally infirm and must give way to an indeterminate "multidimensional analysis" that takes account of "the forum's obligations to other states." Pet. Cert. 10-11. Thus, Petitioners now challenge in this Court the very reasoning of

their Full Faith and Credit claim in the Tennessee Court of Appeals.

In sum, neither the Tennessee courts nor Mrs. Davis were previously alerted to the Full Faith and Credit claim now raised by Petitioners for the first time in their brief before this Court. The fact that the claims in the state court and before this Court are both generically identified as Full Faith and Credit claims is not enough to satisfy Petitioners' "heavy burden" to raise the federal question in the state courts, *see Campbell v. Louisiana,* 523 U.S. 392, 403 (1998); *Adams v. Robertson,* 520 U.S. 83, 86 (1997), and make their federal question argument with "fair precision," *Adams v. Robertson,* 520 U.S. at 88. This is especially true here, since their state court and Supreme Court positions on the obligations of the forum under the Full Faith and Credit Clause are in direct and stark conflict.

Petitioners' disregard of the principle that federal questions must first have been raised and finally resolved in the state court proceedings is also strikingly evidenced by a related claim that Petitioners raise for the first time in this Court. They urge the Court to use this case as a vehicle for establishing the principle of separate marital domiciles for spouses who have separate individual domiciles. Pet. Cert. 19. However, this issue was not raised or even hinted at in the state court proceedings. Neither Mrs. Davis nor the Tennessee state courts ever had an opportunity to address it.

E. None of the Exceptions of *Cox Broadcasting Corp.* Are Applicable

In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477 (1975), the Supreme Court identified four narrow categories of cases in which a state judgment might be considered final, even though there are further proceedings in

the lower state courts to come. The first category is one in which there are further proceedings, but "the federal issue is conclusive or the outcome of further proceedings preordained." The present case does not fit within this category. Petitioners' counsel has affirmatively stated that Petitioners have other grounds on which they could prevail. Resp. App. A-1, B-1. Furthermore, if Petitioners succeeded in their lawsuit in Florida, the federal question would be mooted. In addition, Mrs. Davis could still challenge the validity of the waiver on the ground of duress. Thus, at this stage the federal question can hardly be regarded as conclusive.

The second category referred to in *Cox Broadcasting Corp.* involves cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of the future state-court proceedings." 420 U.S. at 480. Again, this case does not fit within this category. As has already been explained, Petitioners apparently believe they can prevail in Tennessee or Florida on state law or other federal law grounds, thus obviating the need to ever consider the federal question presented to this Court by Petitioners.

The third category refers to "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case." *Id.* at 481. The present case does not fit in this third category either. Were Petitioners to lose after having exhausted all avenues in Tennessee and Florida now available to them, the federal question could then be presented to this Court, at a time when there would truly be a final judgment in the state courts.

The last category involves those situations:

> where the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-83. In this case, were the Tennessee Court of Appeals' determination to be reversed, this would not be preclusive of further litigation on the cause of action. For example, the Tennessee Court of Appeals explicitly stated that "our holding on the issue of public policy makes it unnecessary for us to address the issue of duress." Pet. App. A-15. Were the public policy ground barred, Mrs. Davis could still proceed with her claim for statutory rights and the invalidity of the waiver based on the theory of duress.

Clearly, none of the categorical exceptions of *Cox Broadcasting Corp.*, which are to be applied narrowly, are applicable. Equally significant, the nature of the federal question may alter as the litigation develops. For example, if the petition is denied but Petitioners somehow prevailed in the Florida courts, then Mrs. Davis, rather than Petitioners, may be making a full faith and credit argument – specifically, that Florida must give full faith and credit to a Tennessee *judgment*. Thus, to proceed now would encourage fragmentary review, an outcome firmly disfavored by this Court. As was stated in *Radio Station WOW v. Johnson*, 326 U.S. 120, 127 (1945), "Of course, where the remaining litigation may raise other federal questions that may later come here . . . to allow review of an intermediate

adjudication would offend the decisive objection to fragmentary reviews."

II. PETITIONERS HAVE FAILED TO COMPLY WITH THE MANDATE OF SUPREME COURT RULE 14.1(g)(i)

Under Supreme Court Rule 14.1(g)(i), if review of a state court judgment is sought, a petition for writ of certiorari "shall" contain "specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Petitioners' brief fails to comply with this mandatory rule.

In *Adams v. Robertson,* 520 U.S. 83 (1997), the Court refused to reach the federal question raised by the petitioner because of the petitioner's noncompliance with Rule 14.1(g)(i). The respondent in that case had failed to comply with Rule 15.2, which requires a respondent to bring a violation of a rule by the petitioner to the Court's attention in the brief in opposition and not later. Without minimizing the respondent's failure to satisfy this obligation, the Court, nevertheless, held that "we find no interest in penalizing the failure of counsel to comply with Rule 15.2 that overrides the interest of comity or the value to this Court for a fully developed factual and legal record upon which to base decisions." *Id.* at 92.

The Court in *Adams* also rejected the argument that the significance of the underlying issue should override

enforcement of a technical rule. The Court relied on its decisions in *Ticor Title Insurance Co. v. Brown,* 511 U.S. 117 (1994) (per curiam), and *Illinois v. Gates,* 462 U.S. 213, 224 (1983). In the latter of these cases, the Court stated that by "adher[ing] scrupulously to the customary limitations on our discretion" by application of the Rules, "we promote respect ... for the Court's adjudicatory process." *Gates,* 462 U.S. at 224. Inasmuch as Petitioners have completely ignored the mandate of Supreme Court Rule 14.1(g)(i), their petition should be denied.

III. TENNESSEE HAS A SIGNIFICANT AGGREGATION OF CONTACTS SO THAT APPLICATION OF ITS LAW IS CONSTITUTIONALLY PERMISSIBLE UNDER THIS COURT'S RECENT UNANIMOUS DECISION IN *FRANCHISE TAX BOARD V. HYATT*

For the reasons stated below, Petitioners' arguments are without merit. In particular, this Court's recent unanimous decision in *Franchise Tax Board v. Hyatt,* 538 U.S. 488 (2003) and its earlier landmark decision in *Allstate Insurance Co. v. Hague,* 449 U.S. 302 (1981) are dispositive.

A. This Court's Recent Unanimous Decision in *Franchise Tax Board v. Hyatt* Is Controlling Precedent

This Court's decision in *Franchise Tax Board v. Hyatt,* 538 U.S. 488 (2003), is controlling precedent and entirely dispositive of the matter. When an earlier Supreme Court decision has so explicitly addressed and resolved the question raised, the substantial federal question requirement is not satisfied and certiorari must be denied. *See, e.g., Palmer Oil Corp. v. Amerada Corp.,* 343 U.S. 390, 391-92 (1952); *Zucht v. King,* 260 U.S. 174, 176-77 (1922);

Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308, 311 (1902).

In *Franchise Tax Board,* 538 U.S. 488 (2003), the Nevada Supreme Court refused to apply a California statute immunizing its tax collection agency from private lawsuits. Unlike California, Nevada law had waived sovereign immunity with respect to intentional torts. In a *unanimous* opinion, per Justice O'Connor, this Court first drew a sharp distinction in the application of the Full Faith and Credit Clause between foreign state judgments and foreign state laws. In the case of judgments, the Full Faith and Credit Clause is "exacting." *Id.* at 494. However, "it is less demanding with respect to choice of laws." *Id.* Specifically, the Court quoted from its earlier decision in *Sun Oil Co. v. Wortman,* 486 U.S. 717, 722 (1988), which quoted the earlier decision in *Pacific Employers Insurance Co. v. Industrial Accident Commission,* 306 U.S. 493, 502 (1939), for the governing principle that the "Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"

In their brief, Petitioners strikingly fail to recognize the distinction in treatment of foreign state *judgments* and foreign state *laws* under the Full Faith and Credit Clause. Indeed, Petitioners rely heavily on *Baker v. General Motors Corp.,* 522 U.S. 222 (1998). However, theirs is a troubling mischaracterization of the holding in *Baker.* The language from *Baker* quoted in Petitioners' brief actually only refers to *judgments* and, indeed, the Court is careful to italicize the word "judgments" to distinguish it from *laws* of another state. *Id.* at 233. The present case involves laws, *not* judgments.

The state of California argued in *Franchise Tax Board* that a new rule was needed to protect core constitutional

interests. This Court rejected the call to frame a new rule of law and ignore binding precedent. It emphasized that it had unequivocally abandoned its prior balancing-of-state-interests conflict of laws approach. 538 U.S. at 495. Indeed, Justice O'Connor, for the Court in *Franchise Tax Board,* concluded her opinion by warning that "[w]ithout a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause." *Id.* at 499.

Although not calling it "balancing" or "weighing," Petitioners are urging on this Court a return to an analytic process that inevitably will require "balancing" and "weighing" in one form or another. This so-called "multi-dimensional" approach deviates markedly from the evolving practice of this Court over the past half century beginning with such cases as *Carroll v. Lanza,* 349 U.S. 408 (1955) and *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66 (1954). This contemporary jurisprudence has largely displaced the decisions from the 1930s and earlier relied on so heavily by Petitioners in their brief. More recent cases like *Franchise Tax Board, Sun Oil Co. v. Wortman,* 486 U.S. 717 (1988) and *Nevada v. Hall,* 440 U.S. 410 (1979) all return to the central principle set forth in *Pacific Employers Insurance Co. v. Industrial Accident Commission,* 306 U.S. 493, 502 (1939), which bears repeating: "[T]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"

This principle cuts forum states a wide swath in deference to our union of coequal sovereign states. Nevertheless, there are certain limits on a state's power to pursue its public policy by applying its own law. The forum state can apply its law so long as the subject matter is "a subject matter concerning which [the forum state] is

competent to legislate." *Franchise Tax Board*, 538 U.S. at 494. *See also Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988). If it is competent to legislate, then the forum can apply its own law, regardless of interests or contacts of other states. If it lacks the competence, then it cannot apply its own law at all.

When is a state "competent to legislate" and thereby to choose to apply its own law? This Court, in *Franchise Tax Board*, quoted from *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), and *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981): "'[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Franchise Tax Board*, 538 U.S. at 494, 495.

Allstate Insurance Co. clarifies contacts that will be deemed "significant." The contacts of Tennessee in the present case easily meet and exceed the contacts that were held to satisfy the standard in *Allstate Insurance Co.* In that case the plurality opinion identified three contacts that the forum, Minnesota, had. First, Mr. Hague, whose wife was seeking a recovery from an insurer for her husband's motorcycle-related death, had commuted to work in Minnesota on a routine basis, although he was not commuting when he died. The opinion emphasized that membership in the state workforce was an important contact though it implicates "a state interest less substantial than does resident status." 449 U.S. at 314. In the present case, the decedent was a resident of Tennessee at all times. The Record establishes that Mrs. Davis was also a resident of Tennessee at the critical moment of the decedent's death. R. vol. I, at 1. Just as Minnesota's work

force is affected by the level of protection the state extends employees at the time of death, *id.* at 315, so, too, Tennessee's resident surviving spouses are affected by the protection Tennessee affords them and the criteria it utilizes in determining if they have waived those protections.

The second factor that Minnesota could claim in *Allstate Insurance Co.* as a contact was the insurer's presence at all times in Minnesota. Thus, it should have been familiar with the prospect that the state would apply forum law. There was "no element of unfair surprise or frustration of legitimate expectations." *Id.* at 318 n.24. Likewise, in the present case, the decedent knew he was a lifetime Tennessee domiciliary, whose assets were located primarily in Tennessee, and whose estate would likely be administered in Tennessee and not Florida. He had attorneys who could have informed him that Tennessee statutory and case law had for decades not enforced *lex loci contractus* when the contract violated Tennessee public policy. *See, e.g., Bowman v. Price,* 226 S.W. 210, 214 (Tenn. 1920). He should also have known that full and fair disclosure was another important public policy of his domicile when considering the validity of antenuptial agreements waiving statutory rights of a surviving spouse. Moreover, the decedent's expectations, if any, were certainly not "legitimate." As the Court of Appeals pointedly explained, "the parties to this action do not dispute that the Davises' antenuptial agreement was entered into by the parties without full and *fair* disclosure." Pet. App. A-14 (emphasis added).

The third and final factor in *Allstate Insurance Co.* contributing to Minnesota's significant aggregation of contacts was the surviving spouse's Minnesota residence at the time the litigation commenced. Even though she became a resident just as the suit commenced, the Court still credited the state with this contact. In Mrs. Davis'

case, she had been a resident of Tennessee well before Mr. Davis' death and the commencement of this litigation.

B. Tennessee Has a Particularly Significant Aggregation of Contacts

The actual extent of Tennessee's contacts are considerably more extensive than those identified in *Allstate Insurance Co.* When a surviving spouse of a Tennessee domiciliary executes a valid waiver as part of an antenuptial agreement, the surviving spouse is foregoing valuable statutory rights granted by the legislature of *Tennessee* in conjunction with the distribution of the *Tennessee* property of a *Tennessee* domiciliary. The waiver relates directly to how much the surviving spouse and other devisees will inherit pursuant to the inheritance law of *Tennessee*. It affects deeply the relationship of Tennessee domiciliaries to their spouses and the trust and confidence that parties bring to the institution of marriage. This is especially true when, as here, the surviving spouse is a resident of Tennessee at the time of her spouse's death.

Furthermore, the very Petitioners who now claim that Tennessee has no interest were the ones who initiated the probate proceeding in Tennessee and not in Florida. They sought the assistance of the *Tennessee* courts in assuring the efficient and proper distribution and administration of the estate of a Tennessee domiciliary. They derive their very authority as J.D. Davis' legal successor from their appointment by the Tennessee courts, which they sought out. They remain accountable to this day to the Tennessee courts and those of no other state. They asked the Tennessee courts to find Mrs. Davis' statutory claims invalid under *Tennessee* law and, having been repudiated by the Tennessee courts, they now assert that those courts had no authority to determine the very issue they presented.

In contrast, even assuming Mrs. Davis was and is a Florida domiciliary, one struggles to identify Florida's interest in denying one of its widowed domiciliaries property that another state, Tennessee, is willing to give to her. Florida certainly has no interest in diminishing the take of one of its domiciliaries so as to enhance the inheritances of Petitioners, who are not Florida domiciliaries or residents. R. vol. I, at 1.

C. Tennessee Acted Sensitively and Respectfully with Regard to Florida's Law

Even though Tennessee easily satisfies the aggregation of significant contacts test, the Court in *Franchise Tax Board* did indicate another basis for disallowing the forum's application of its public policy, that is, when the forum state exhibits "'a policy of hostility to the public Acts' of a sister State." 538 U.S. at 499 (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). A fair reading of the opinion of the Tennessee Court of Appeals leaves no doubt but that the Court of Appeals went well beyond what was constitutionally required in showing sensitivity to the Florida law. With great care and detail, it analyzed that law and then contrasted it with Tennessee's. The Court explicitly identified the legitimate policies it was pursuing – the encouragement of the utmost good faith between spouses, one of whom was a domiciliary of the state and the other a resident, and the assurance that spousal waivers in "a probate proceeding which could occur only in Tennessee" are entered into knowledgably or with full and fair disclosure. Pet. App. A-14.

D. Tennessee Law, Like the Law of Virtually Every Other State, Requires a Higher Degree of Disclosure by the Parties in the Case of an Antenuptial Agreement than in the Case of an Ordinary Commercial Agreement

Tennessee, like virtually every other state in the country that grants statutory rights at death to a surviving spouse, requires a higher degree of disclosure or knowledge with respect to waivers of such rights by antenuptial agreement than in the case of ordinary commercial contracts. Indeed, there appear to be only three exceptions – Florida, New York, and Georgia. *See* Jeffrey A. Schoenblum, 2005 Multistate Estate Planning Guide Table 6.04 (2005). Far from asserting a novel public policy in this case, Tennessee is merely seeking to assure the preservation of rights that are widely recognized nationally. Furthermore, Tennessee's mainstream approach belies any suggestion that its enforcement of such rights "exhibits a 'policy of hostility to the public Acts' of a sister State." *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 499 (2003) (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)).

Nevertheless, Petitioners cite *Soloman v. Murrey*, 103 S.W.3d 431, 434 (Tenn. Ct. App. 2002) for the proposition that in Tennessee antenuptial agreements are "interpreted and enforced like any other contracts." The *Soloman* court, however, actually proceeds to offer the following vital caveat with respect to antenuptial agreements: "the courts must closely examine the circumstances of their formation, to make sure [antenuptial agreements] have been entered into freely, knowledgably, and in good faith, without duress or undue influence." *Id.* (citing *Randolph v. Randolph*, 937 S.W.2d 815 (Tenn. 1996); *Wilson v. Moore*, 929 S.W.2d 367 (Tenn. 1996)). Indeed, the Tennessee Supreme Court has been consistent over the years, most

recently in *Bratton v. Bratton*, 136 S.W.3d 595 (Tenn. 2004), as has the Tennessee legislature via Tenn. Code Ann. § 36-3-501, in holding antenuptial and postnuptial agreements to a higher standard than the typical commercial contract. Because marriage is involved, the highest degree of fiduciary duty between the parties is called for. As the Court of Appeals in the present case stated, "An engagement to marry creates a confidential relation between the contracting parties and an antenuptial agreement contract entered into after the engagement and during its pendency must be attended by the utmost good faith." Pet. App. A-13 (quoting *Bratton v. Bratton*, 136 S.W.3d at 601). *See also* Eugene Scoles, et al., *Conflict of Laws* § 18.19 (3d ed. 2000) (recognizing that choice-of-law principles applicable to ordinary commercial contracts properly should not apply to succession-related contracts).

E. The Court Should Not Unsettle the Venerable and Established Conflict of Laws Principles in This Area of Law

With Court precedent settled in Mrs. Davis' favor, Petitioners rely to a large degree on several law review articles and other secondary sources for support. Petitioners refer to certain scholars, such as Professors Weintraub and Laycock, without noting that these very scholars' theories have come under withering assault from other conflicts scholars. *See, e.g., A Conflict-of-Laws Anthology* chs. 6, 10C (Gene R. Shreve, ed., 1997). Indeed, as this Court stated in *Sun Oil v. Wortman*, 486 U.S. 717, 728-29 (1988), "In sum, long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional. . . . It is not the function of this Court, however, to make departures from established choice-of-law precedent and practice constitutionally mandatory."

Moreover, a review of the secondary sources relied upon by Petitioners reveals a less than precise presentation. A critical example is Petitioners' reliance on the Restatement (Second) of Conflict of Laws § 6. Petitioners cite this section for the principle that a variety of factors have to be taken into account. However, that section defers to a more specific provision, § 265. Section 265 specifically provides for the application of the law of the *decedent's* domicile in determining a surviving spouse's rights, including the validity of an antenuptial agreement that opts expressly or implicitly for a different governing law. As Comment *b* of § 265 makes clear, the domicile "might" apply a different law, but is by no means required to do so, even when there has been an explicit and knowing designation of a different law in the waiver.

The common law also strongly supports the principle that the conflicts rules applicable to ordinary contracts do not apply when the waiver of statutory rights associated with succession is involved. In the principal contemporary common law precedent, *In re Bulova's Will,* 14 A.D.2d 249, 220 N.Y.S.2d 541 (App. Div. 1961), the Appellate Division of the New York Supreme Court held that the law of New York, where the probate proceedings were and the decedant was domiciled, governed. This was held to be the case even though the waiver of statutory rights by way of a postnuptial agreement had been executed out-of-state. The Court stated that "the mere fact an instrument is a contract does not mean that the conflict rules to be applied are those associated with contract but, rather, may be and would most likely be those associated with the jural relations directly affected by provisions of the agreement." 14 A.D. at 255, 220 N.Y.S.2d at 547. The *Bulova* court went on to state: "Hence, it is one or more of the specialized rules applicable to conveyances, elections, releases, waivers, and the like, rather than the more generalized one based on the place of contracting which determine the

formalities required for the execution of the [postnuptial] agreement." 14 A.D. at 255-56, 220 N.Y.S.2d at 547.

Bulova follows upon the venerable *Emery v. Burbank*, 163 Mass. 326, 329, 39 N.E. 1026, 1027 (1895), in which then-*Massachusetts* Justice Oliver Wendell Holmes concluded that Massachusetts law governed, even though it invalidated an oral contract to make a will, which was valid where and when made in Maine. Justice Holmes explained that "the final domicile [of the decedent] is more concerned in the policy to be insisted on [when the decedent's estate is affected] than any other jurisdiction." *Id.*, *see also Rubin v. Irving Tr. Co.*, 305 N.Y. 288, 301-02, 113 N.E.2d 424, 429 (1953) (holding that New York courts could refuse to enforce an oral contract not to change a will executed in and valid under Florida law because New York had the most significant contacts in that the property at issue was in New York where decedent had been domiciled and where performance on the contract would take place). As another leading and influential conflicts scholar, Professor Robert Leflar, wrote in a passage quoted by the *Bulova* court: "At the same time it must be remembered that, apart from the contract itself, legal effect upon titles in particular property is controlled by the law that governs the property as such, often a different law from that which governs the contract." 14 A.D.2d at 257, 220 N.Y.S.2d at 548.

Even were the Court so inclined to take on the Herculean and inevitably frustrating chore of developing a coherent national system of conflicts guidelines, the facts of this case are not the appropriate vehicle. If there is one area of conflicts law where there are settled rules, it is succession law, including the waivers that directly impact on the inheritance claims of interested persons.

F. The Constitutional Principle Urged by Petitioners Would Have a Severely Destabilizing Effect Nationally on State Inheritance Law

A choice of law principle that would require the probate court at the decedant's domicile to refer to the standards of a different state when determining whether statutory benefits granted by the forum state had been properly waived would complicate and delay the inheritance process and drive up the expense of probate. It would contribute considerable unpredictability as local probate judges and probate lawyers sought to determine accurately the subtleties of foreign law and the domiciliary status of the surviving spouse. It would introduce lack of uniformity with respect to the claims of surviving spouses of local decedents, if their particular rights hinged exclusively on where the agreement had been executed. It would encourage unscrupulous spouses and fiancés to plan the execution of the waiver in one of the few states like Florida where financial disclosure is not required.

By way of contrast, reference to the law of the decedent's domicile and primary probate assures reference to the same law for all surviving spouses, more efficient resolution of the probate process and distribution of estate property, and denial of opportunity to wily spouses to bypass statutory rights afforded their surviving spouses by execution of the waiver in certain lenient states. The interest of the domicile in assuring that its citizens exercise the utmost good faith in their marriages would also be furthered.

The current approach of reference to the law of the domicile of the decedent does not deny the parties the opportunity to enter into a reciprocal waiver of statutory

rights. That can readily be accomplished by simply disclosing to each other their finances so that they each enter into the antenuptial agreement "knowledgeably."

G. Tennessee Has a Vital Interest in Resident Surviving Spouses, of Which Mrs. Davis Was One at the Time of Her Husband's Death

Apparently in an effort to create an impression of a strong and enduring link exclusively with Florida, Petitioners repeatedly assert that Mrs. Davis was a domiciliary of Florida not only at the time that the antenuptial agreement was executed but afterwards. There is absolutely nothing at all in the Record to support this unsubstantiated statement. Petitioners cannot possibly determine from the Record what Mrs. Davis' status was after she married. Indeed, she might even have become a domiciliary of Tennessee, whether or not she retained her domicile in Florida. *See, e.g., Worcester County Tr. Co. v. Riley,* 302 U.S. 292 (1937).

By way of contrast, the Record is rich with evidence that, at the time of her husband's death and in the immediately preceding years, Mrs. Davis was not only physically a resident of Tennessee, but that she personally considered herself a resident of the state and Petitioners considered her to be a Tennessee resident as well. Notably, in their Petition for Probate, Petitioners identified Mrs. Davis' residence as "4507 Price Circle Road, Nashville, TN 37205." R. vol. I, at 1. They did not list or indicate a Florida residence or domicile. On federal income tax returns for the last full three years of their marriage, 1999-2001, Mrs. Davis and her husband filed joint returns with only a Tennessee address listed. R. vol. II, at 160, 163, 166. On September 23, 2002, Mrs. Davis filed a claim against the estate with the Probate Court. She identified

herself as the claimant and listed her address as "4507 Price Circle Road, Nashville, TN 37205." R. vol. I, at 41. When her attorneys submitted petitions for her statutory rights, she was copied on all filed documents, with only a Nashville address listed. R. vol. I, at 53, 58, 63, 68.

One of Petitioners' major arguments is that Mrs. Davis had no connection with Tennessee. They completely overlook her connection as a resident. In many respects, residence is actually a more significant day-to-day practical affiliation than domicile. Tennessee, as every other state, has a very real interest in assuring that resident surviving spouses, and often their minor children, are adequately provided for so that they do not become a burden on the state in which they reside. This is a sound public policy, as is encouraging the utmost good faith between resident spouses in their dealings with each other.

IV. CONCLUSION

For these reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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615-742-7730

and

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APPENDIX A

BAKER
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June 28, 2005

Overton Thompson, III, Esq.
Bass, Berry & Sims
Suite 2700, AmSouth Center
315 Deaderick Street
Nashville, TN 37238-3001

VIA HAND DELIVERY

Re: Dorothy L. Davis/Estate of J.D. Davis, Deceased

Dear Overton:

In response to your letter of May 17, 2005 and the more recent letters, we do not agree that the claims of Dorothy Davis are finally resolved in her favor. This response and the information furnished are without waiving any rights, claims, defenses, setoffs, counter-claims or other actions and resources available to the Executors for the benefit of the Estate.

As you are fully aware, the Executors have followed and fulfilled their responsibility to uphold the Will of the Decedent and contractual commitments made during his lifetime. This has included following the terms of the Will and providing Dorothy Davis with the personal and financial benefits granted to her by the terms of the Will until recent date.

There is really very little pertinent information about the Estate which is not already known to you and your client. Enclosed for reference is a copy of the Estate Inventory filed by the Executors on August 6, 2002, a copy of which was duly furnished to counsel for Mrs. Davis. Also enclosed are copies of the Federal Estate Tax return (Form 706) and the Tennessee Inheritance Tax return which give the details and values for every asset.

Much of the requested information is moot and not relevant. By an agreement signed by Mrs. Davis on April 3, 2004, she specifically waived and released all of her rights and interests in the personalty in the Nashville residence.

The value of the estate is substantially the interests in the limited partnerships, all of which are minority interests. You are aware of the sale of the interest in Boulevard Terrace Rehabilitation and Nursing Center, LP and have a letter giving complete details. I do not have the most current information on Items 6 f-i but the values are minimal. The last I heard about Meecham and Company it was a plan to liquidate by the operating owner. Recently and at some expense, one of the oil leases is producing but there is a pending suit by the land owner seeking to terminate the lease.

As you are well aware, the Price Circle residence was sold and Mrs. Davis received a cash portion of the proceeds and signed a release.

Also enclosed is a copy of the last accounting filed with the Court.

This letter and the enclosures fairly well answer all of your inquiries about the Estate. As stated above, this information is furnished voluntarily and without any waiver of any kind.

Very truly yours,

BAKER, DONELSON,
BEARMAN, CALDWELL
& BERKOWITZ, PC

/s/ Richard D. Bird
Richard D. Bird

RDB:vmr

Enclosures

cc: Julie Griffin
Doug Davis
T.O. Helton
(All without enclosures)

APPENDIX B

BAKER
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July 20, 2005

Overton Thompson, III, Esq.
Bass, Berry & Sims
AmSouth Center, Suite 2700
Nashville, TN 37238-3001

Re: Estate of J.D. Davis/Dorothy Davis

Dear Overton:

To supplement the material previously furnished, enclosed are copies of the 2004 Schedule K-1's in the following minor interests in the estate:

Valley View, Ltd.
Glen Valley Apartments & Duplexes
Sycamores Apartments
Sycamores Terrace, LLC
Somerset Village Apartments
BTRNC, LLC (sold)
Boulevard Terrace Rehabilitation
& Nursing Center, LP (sold)

Based on the most recent information, Meacham and Co. has little if any value. Last I saw, the other 50% partner offered $700 for the 50% interest owned by the estate.

As I have advised in previous correspondence, it is not considered that the claims of Dorothy Davis against the estate are finally resolved.

Very truly yours,

BAKER, DONELSON,
BEARMAN, CALDWELL
& BERKOWITZ, PC

/s/ Richard D. Bird
Richard D. Bird

RDB:vmr

Enclosures

cc: Julie Griffin (via email, w/o enclosures)
Doug Davis (via email, w/o enclosures)

APPENDIX C

[SEAL] Court of Appeals – Middle Division
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Date Printed:	08/26/2005
Notice Date:	08/26/2005
Case Style:	Dorothy L. Davis v. J. Douglas Davis and Julie Ann Davis Griffing, Co-executors under the Last Will and Testament of J.D. Davis, deceased
Case Number:	M2003-02614-COA-R3-CV
Action:	Date Filed: 08/26/2005 Court Order Filed: Related to Mandate: Denying Motion to Recall Mandate::
Trial Court:	Davidson County Trial Court Number: Probate Court 02P-859

The Appellate Court Clerk's office has entered the above action in the Justice Information Tracking System.

CRV

C: Thomas O. Helton
Davidson County Circuit Court Clerk

C-2

IN THE COURT OF APPEALS
OF TENNESSEE AT NASHVILLE

DOROTHY L. DAVIS v. J. DOUGLAS DAVIS, ET AL.

Circuit Court for Davidson County
No. 02P-0859

No. M2003-02614-COA-R3-CV

ORDER

(Filed Aug. 26, 2005)

Respondents/Appellees J. Douglas Davis and Julie Ann Davis Griffin have moved this Court to recall the mandate that was issued in this matter on May 13, 2005. The basis for the motion is that movants have filed a petition for a Writ of Certiorari in the Supreme Court of the United States and that Court has advised the Clerk of this Court that the petition has been filed and placed on the docket. A memorandum was filed in support of the motion. The Petitioner/Appellant, Dorothy L. Davis, filed a memorandum in opposition to the motion to recall mandate.

Rule 42(c) of the Tennessee Rules of Appellate Procedure, provides that this Court may stay a mandate in cases in which review by the Supreme Court of the United States may be sought and section (d) of that rule provides that the power to stay a mandate includes the power to recall a mandate. Having reviewed the motion and supporting documents as well as the memorandum in opposition to the motion, it is determined that the motion is not well taken and the motion to recall mandate is denied. IT IS SO ORDERED.

/s/ David R. Farmer
DAVID R. FARMER,
JUDGE

/s/ Alan E. Highers
ALAN E. HIGHERS,
JUDGE

APPENDIX D

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN, as co-executors of the estate of J. D. Davis, deceased,

Plaintiffs,

v.

DOROTHY L. DAVIS,

Defendant. /

CASE NO.: 50 2005CA 006717 XXXX MB

COMPLAINT

(Filed Jul. 19, 2005)

Plaintiffs, J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN, as co-executors of the estate of J. D. Davis, deceased ("Plaintiffs"), sue the Defendant, DOROTHY L. DAVIS ("Defendant"), and allege:

JURISDICTION AND VENUE

1. Plaintiffs are co-executors of the estate of J. D. Davis, (the "Deceased"), as appointed in his Last Will and Testament. J. Douglas Davis is a resident of Brentwood, Williamson County, Tennessee. Julie Ann Davis Griffin is a resident of Winston-Salem, North Carolina. J. D. Davis ("Decedent")'s probate estate is being administered in the Seventh Circuit Court for Davidson County, Tennessee, Probate Division, Case Number 02P-859.

2. Defendant is over the age of eighteen (18) years, sui juris, and a resident of Palm Beach Gardens, Palm Beach County, Florida.

FACTS COMMON TO ALL COUNTS

3. On July 19, 1990, for mutual consideration and mutual protection of their respective assets, Decedent and Defendant executed a written agreement entitled "Ante-Nuptial Agreement," a copy of which is attached hereto as Exhibit "A" (hereinafter referred to as the "Agreement").

4. The Agreement was entered into and signed by both Decedent and Defendant in Palm Beach County, Florida.

5. Pursuant to the mutual terms of the Agreement, the individual assets of Decedent and Defendant were, at all times during their marriage, to be maintained separate and apart from each other's individual assets. Specifically, the Agreement provides that the parties' then-owned or thereafter acquired individual assets shall be "free from any claim of the other that may arise by reason of their marriage." The Agreement also provides that each spouse waives the right of election, homestead, and other statutory allowances upon the death of the other. Under Florida law, the language of the Agreement waives all marital rights including, but not limited to, the right of election, homestead, exempt property, and a year's support allowance.

6. The Agreement and the provisions therein are valid and enforceable pursuant to Section 732.702, *Florida Statutes* (2004). Although not required by the statute, the

Agreement recites that disclosure of the financial assets of each party was made to the other.

7. At all times material hereto, Decedent spent part of the year at his residence in Palm Beach County, Florida and part in Tennessee. Defendant always maintained her residency in Palm Beach County, Florida.

8. Decedent and Defendant were married in Palm Beach County on July 20, 1990. Both parties were widowed and had children and grandchildren from prior marriages.

9. On September 18, 2001, Decedent executed his Last Will and Testament in Nashville, Tennessee, leaving property to various individuals, including significant interests for the benefit of Defendant. A copy of Decedent's Last Will and Testament is attached hereto as Exhibit "B."

10. Decedent died in Palm Beach Gardens, Florida on May 9, 2002, at the age of 86 years.

11. On May 15, 2002, Plaintiffs filed a Petition to Probate the Last Will and Testament of J. D. Davis in the Probate Court of Davidson County, Tennessee. Decedent's Will was admitted to probate by Order of the Seventh Circuit Court for Davidson County, Tennessee, Probate Division ("Davidson County Probate Court). On May 15, 2002, Letters Testamentary issued to Plaintiffs.

12. On December 5, 2002, Defendant, in violation of the Agreement, filed in the Davidson County Probate Court a Petition for Elective Share; a Petition for Year's Support Allowance; a Petition for Exempt Property; and a Petition for Homestead. Thereafter, Plaintiffs filed a motion for summary judgment against Defendant's claims.

13. On April 23, 2003, the Davidson County Probate Court granted the motion for summary judgment and rejected Defendant's claims for elective share, homestead property, exempt property, and a year's support allowance. The Davidson County Probate Court ruled that the Agreement is valid and enforceable under Florida law and denied, with prejudice, Defendant's claims for elective share, homestead, exempt property, and a year's support allowance. A copy of the order is attached hereto as Exhibit "C."

14. Subsequently, on September 1, 2004, the Tennessee Court of Appeals reversed the decision of the Davidson County Probate Court, declining to enforce the Agreement. The Tennessee appellate court determined that, although the Agreement is valid under Florida law, it is unenforceable in Tennessee as a matter of public policy. A copy of the decision is attached hereto as Exhibit "D."

15. The Tennessee Supreme Court denied Plaintiffs' Application for Permission to Appeal and subsequent Petition for Rehearing.

16. In violation of the Agreement, Defendant is presently asserting claims against Decedent's estate for elective share, homestead, exempt property, and a year's support allowance before the Davidson County Probate Court.

COUNT I – BREACH OF ANTE-NUPTIAL AGREEMENT

17. Plaintiffs reallege paragraphs one (1) through sixteen (16).

18. This is an action for money damages for breach of contract in excess of Fifteen Thousand Dollars ($15,000.00), exclusive of interest and costs.

19. Decedent and Defendant entered into the written Ante-Nuptial Agreement attached hereto as Exhibit "A," in which Defendant agreed that Decedent's property would be " . . . free from any claim of the other that may arise by reason of their marriage . . . " *See* ¶ 1 of the Agreement.

20. In executing the Agreement, Defendant waived and released "the right of election, in accordance with the requirements of the Estates, Powers and Trust Law of the State of Florida or of the same or similar law of any other jurisdiction which might be applicable." *See* ¶ 2 of the Agreement.

21. Defendant breached the Agreement by imposing the right of election, homestead, exempt property, and a year's support allowance in the Davidson County Probate Court.

22. As a result of Defendant's breach of the Agreement, Decedent's estate has suffered damages in the form of attorneys' fees and legal expenses incurred in defending against Defendant's wrongful and unjustified claims and will continue to incur attorneys' fees and legal expenses.

23. Additionally, also as a consequence of Defendant's breach of the Agreement, Decedent's estate will sustain damages in the amount of Defendant's recovery for elective share, homestead, exempt property, and a year's support allowance.

WHEREFORE, Plaintiffs, J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN, as co-executors of the Estate of J. D. Davis, deceased, demand judgment against

Defendant, DOROTHY L. DAVIS, for compensatory damages, pre and post judgment interest, attorneys' fees, costs, and such other relief as is just and proper.

COUNT II - SPECIFIC PERFORMANCE

24. Plaintiffs reallege paragraphs one (1) through sixteen (16).

25. This is an action for specific performance seeking Defendant's compliance with the Agreement.

26. The Agreement is definite and certain in all of its essential elements, including its purpose and spirit.

27. Paragraph Eight (8) of the Agreement specifically provides that each party shall execute and deliver any additional documents reasonably required to carry the intention of the Agreement into effect.

28. Defendant has violated the Agreement by asserting claims which she waived and released when she executed the Agreement.

29. Decedent's estate will suffer irreparable injury and has no adequate remedy at law if Defendant is permitted to recover the elective share, homestead property, exempt property, and a year's support allowance because the Tennessee courts will not enforce the Agreement.

30. Plaintiffs seek specific performance by Defendant to comply with Paragraph Eight (8) of the Agreement. Defendant should be required to execute a valid release or instrument which will waive, nullify, and dismiss her pending claims in Tennessee for elective share, homestead, exempt property, and a year's support allowance.

WHEREFORE, Plaintiffs, J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN, as co-executors of the Estate of J. D. Davis, deceased, request the entry of an order requiring Defendant, DOROTHY L. DAVIS, to execute an instrument, which will waive, nullify, and dismiss her pending claims in Tennessee for elective share, homestead, exempt property, and a year's support allowance. Plaintiffs further request an order awarding them their attorneys' fees and costs incurred in prosecuting this action, together with such other relief as is just and proper.

COUNT III - DECLARATORY JUDGMENT

31. Plaintiffs reallege paragraphs (1) through sixteen (16).

32. This is an action for declaratory judgment pursuant to Section 86, *et seq.*, *Florida Statutes* (2004), seeking declaratory relief with respect to the parties' obligations under the Agreement attached hereto as Exhibit "A."

33. The Agreement specifically provides that the Decedent and Defendant's then-owned and thereafter acquired individual assets shall be "free from any claim of the other that may arise by reason of their marriage."

34. The Agreement further provides that each spouse waives the right of election, homestead, exempt property, and a year's support allowance.

35. Pursuant to Section 732.702, *Florida Statutes* (2004), the Agreement is valid and enforceable in the State of Florida.

36. Following the Decedent's death in Palm Beach County, Florida and the probating of Decedent's Will in Davidson County, Tennessee, Defendant violated the precise terms of the Agreement by asserting claims for elective share, homestead, exempt property, and a year's support allowance in the Davidson County Probate Court. Defendant is presently prosecuting these claims, which she intentionally and voluntarily waived when she executed the Agreement.

37. Although the Davidson County Probate Court initially enforced the Agreement against Defendant, the Tennessee Court of Appeals reversed the Probate Court, declining to enforce the Agreement. The Tennessee Court of Appeals ruled that, although the Agreement is valid under Florida law, it is unenforceable in Tennessee as a matter of public policy.

38. Given the rulings of the courts in Tennessee, Plaintiffs are uncertain of their rights and obligations regarding Defendant's present claims for elective share, homestead, exempt property, and a year's support allowance in the Davidson County Probate Court.

39. A present and bona fide dispute exists between the parties regarding their current obligations under the Agreement.

40. There is an actual and present need for a declaration of rights with respect to the parties' obligations under the Agreement.

WHEREFORE, Plaintiffs, J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN, as co-executors of the Estate of J. D. Davis, deceased, request that this Court take jurisdiction over the parties and declare that (1) the

Agreement is valid and enforceable in every respect; (2) Defendant, DOROTHY L. DAVIS, has no right to pursue claims for elective share, homestead, exempt property, and a year's support allowance in the Davidson County Probate Court; (3) Defendant shall execute an instrument, which will waive, nullify, and dismiss her pending claims in Tennessee for elective share, homestead, exempt property, and a year's support allowance; and (4) should Defendant recover in the Davidson County Probate Court, Plaintiffs shall have the right to sue Defendant in Florida for all damages arising from her breach of the Agreement, including but not limited to damages in the amount of Defendant's recovery for elective share, homestead, exempt property, and a year's support allowance, together with attorneys' fees, costs, and such other relief as is just and proper.

Dated: July 19, 2005

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APPENDIX E

**IN THE SEVENTH CIRCUIT COURT
OF DAVIDSON COUNTY, TENNESSEE
(PROBATE DIVISION)**

IN RE:	)	
ESTATE OF J.D. DAVIS	)	
Deceased,	)	**Docket Number: 02P859**
DOROTHY L. DAVIS,	)	**Notice of Entry Required**
Movant/Surviving Spouse,	)	
v.	)	
J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN,	)	
Respondents/Co-Executors,	)	

MEMORANDUM OPINION AND ORDER

(Filed Aug. 26, 2005)

This matter came before the Court on August 12, 2005 upon the Motion to Compel Co-Executors to Dismiss Lawsuit, and for Removal of Co-Executors filed by Dorothy L. Davis as surviving spouse of the deceased J.D. Davis. After a full hearing on this Motion, the Court took this matter under advisement in order to fully consider the oral arguments in conjunction with the Memoranda supplied by both parties.

The Movant is Dorothy L. Davis who is the surviving spouse of J.D. Davis. Dorothy Davis was married to the Deceased for eleven years prior to his death. J. Douglas Davis and Julie Ann Davis Griffin are the Respondents to

this Motion in their capacity as Co-Executors of the Estate of J.D. Davis, their late father.

The Movant filed this Motion seeking to dismiss a lawsuit commenced by the Estate in Florida against Dorothy Davis and to have the Co-Executors removed from their fiduciary capacities. Respondents filed suit in Circuit Court for Palm Beach County, Florida, seeking to have the Florida Circuit Court enforce an ante-nuptial agreement entered into by the Movant and the Deceased one day prior to their marriage.

Based on the reasoning set forth below, it is the opinion of this Court that the relief requested in the Motion shall be denied. However, it is the opinion of this Court that all proceedings in the Florida litigation shall be stayed pending a final determination of the appeal filed and perfected by the Estate to the United States Supreme Court.

There are two issues which this Court must consider. The first is whether the Co-Executors of this Estate should be removed from their fiduciary capacities. The Court must also determine if the lawsuit in Florida filed on behalf of the Estate should be dismissed.

The Movant and the Deceased met in the Spring of 1989. They were engaged to be married the following summer of 1990. During this period the Deceased maintained his primary domicile in Davidson County, Tennessee. He would spend six months per year in Tennessee and six months per year in Florida. One day prior to their wedding the parties entered into an ante-nuptial agreement in the office of the Deceased's attorney. The Movant argued that she was not made fully aware of the Deceased's wealth prior to the execution of this ante-nuptial

agreement. In the ante-nuptial agreement, the Movant waives her rights to any possible elective share, year's support, homestead or exempt property which she may statutorily possess at the time of the Deceased's death.

Mr. Davis died on May 9, 2002. On May 15, 2002 the Co-Executors filed a Petition to Probate the Will of J.D. Davis in this Court. On December 5, 2002 the Movant filed a Petition for Elective Share, Exempt Property, Homestead, and Year's Support Allowance. The Co-Executors filed a responsive pleading in which they stated that the ante-nuptial agreement entered into by the parties barred such a petition. On April 23, 2003, the Honorable Frank G. Clement, Jr. agreed with the Estate and entered an Order on the Estate's Motion for Summary Judgment, dismissing the Movants' Petition for Elective Share, Exempt Property, Homestead, and Year's Support Allowance. A Notice of Appeal was filed by the Movant and the Court of Appeals reversed the trial court finding that this ante-nuptial agreement was not enforceable in Tennessee, because it violated the public policy of this state. The Court of Appeals held that under Tennessee law, a full financial disclosure was required prior to the execution of such document and that this ante-nuptial agreement did not satisfy this requirement. An Application for Permission to Appeal to the Tennessee Supreme Court was then filed by the Estate. That Application was denied by the Tennessee Supreme Court. Subsequently, the Estate filed a Petition for Rehearing with the Tennessee Supreme Court which was also denied. The Estate has now filed a Petition for Writ of Certiorari to the United States Supreme Court. The Estate has also filed the Florida lawsuit seeking to have the Florida Circuit Court of Palm Beach County enforce the questioned ante-nuptial agreement.

This Court will first address the issue of the appropriateness of removing the Co-Executors. During the hearing on this Motion, this Court ruled from the bench that the Movant had not carried the significant burden required to compel this Court to remove a fiduciary. Tennessee Code Annotated § 35-15-706 pertains to the removal of an Executrix. The statute contains in part:

> (a) The settlor, a cotrustee, or a qualified beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.
>
> (b) The court may remove a trustee if:
>
> (1) The trustee has committed a serious breach of trust;
>
> (2) Lack of cooperation among cotrustees substantially impairs the administration of the trust;
>
> (3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
>
> (4) There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.
>
> T.C.A. §§ 35-15-706

This Court finds that none of the specified reasons for removal of an Executrix have been satisfied at this time.

The remaining issue this Court now discusses deals with the dismissal of the pending lawsuit in the Florida

Circuit Court. In light of the pending Petition for Writ of Certiorari to the United States Supreme Court, the Court finds it would be imprudent to dismiss the lawsuit in Florida. The Court does not want to upset the tenuous postures in which the parties are presently situated due to this Writ of Certiorari, thus, this Motion to Dismiss is denied.

This Court maintains proper jurisdiction over the Probate Estate of J.D. Davis and the Co-Executors of such Estate. J.D. Davis was domiciled in Davidson County, Tennessee at the time of his death, as evidenced by the Petition to Probate the Will of J.D. Davis filed by the Co-Executors. The Co-Executors submitted themselves to the jurisdiction of this Court upon their application and acceptance of appointment to their fiduciary roles. An Executor properly qualified before this Court acts as an officer of this Court and is authorized to act by this Court. *Pritchard on Wills and Administration of Estates* §36 (5th ed. 2004). This Court has the authority and responsibility to oversee the administration of all estates.

Tennessee Rules of Civil Procedure 62.07 affords this Court the discretion to order a stay of proceedings in exceptional cases as the court deems proper. With a pending Writ to the U.S. Supreme Court which will bring a final resolution to the appropriateness of the appellate orders of this state, this Court finds that this is an exceptional circumstance which warrants a Stay of Respondents lawsuit pending in Florida. This Court finds that a temporary injunction shall issue against the Co-Executors of this Estate in accordance with TRCP 65.04 which restrains and enjoins them from pursuing the Florida litigation without prior approval from this Court and shall remain in effect pending further orders of this Court.

IT IS SO ORDERED.

/s/ Randy Kennedy
Judge Randy Kennedy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of August, 2005, a true and correct copy of the foregoing **Memorandum Opinion and Order** was forwarded to all of the following counsel of record:

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F-1

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO.:
50 2005 CA 006716 XXXX MB

J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, as co-executors of the estate of J.D. Davis, deceased,

Plaintiffs,

vs.

DOROTHY L. DAVIS,

Defendant. /

DEFENDANT'S MOTION TO ENLARGE TIME TO RESPOND TO COMPLAINT

(Filed Sep. 27, 2005)

Defendant, Dorothy L. Davis, moves pursuant to Rule 1.090 of the Florida Rules of Civil Procedure to enlarge the time within which she must respond to the complaint in this action, and states:

Background

1. As alleged in the complaint, the plaintiffs are the co-executors of the estate of J.D. Davis pending in the Seventh Circuit Court for Davidson County, Tennessee, Probate Division, Case Number 02P-859. (Compl. at ¶ 1).

2. The defendant is the widow of J.D. Davis, the decedent in the Tennessee probate proceeding.

3. Plaintiffs' claims in this action are part of their effort to enforce an ante-nuptial agreement which the defendant allegedly entered with the decedent.

4. On September 2, 2004 – before the plaintiffs filed this action in Florida – the Tennessee Court of Appeals held that the ante-nuptial agreement was unenforceable in the Tennessee probate proceeding. The Tennessee Supreme Court twice denied review of the decision of the Tennessee Court of Appeals.

5. Subsequently, on July 19, 2005, the plaintiffs filed this Florida action alleging a breach of the same ante-nuptial agreement which, approximately ten months before, the Tennessee Court of Appeals declared unenforceable. The plaintiffs also filed a petition for writ of certiorari in the United States Supreme Court seeking to overturn the decision of the Tennessee Court of Appeals. The plaintiffs' certiorari petition remains pending.

6. After the plaintiffs filed this action in Florida, the defendant filed a motion in the Tennessee probate proceeding seeking to compel the plaintiffs to dismiss this action. At nearly the same time, the plaintiffs filed a motion with the Tennessee Court of Appeals to stay the Tennessee proceedings pending a ruling on their petition to the United States Supreme Court.

7. In the meantime, the parties agreed to enlarge the time for the defendant to respond to the complaint in this Florida action. Pursuant to the parties' agreement, the defendant's response to the complaint filed in this action was to be served no later than thirty days after entry of an order on either the defendant's motion to compel or the plaintiffs' motion to stay.

The Tennessee Injunction

8. On August 26, 2005, the Tennessee probate court enjoined the plaintiffs from pursuing this Florida action until further order of the Tennessee probate court. Also, the Tennessee Court of Appeals denied plaintiffs' motion to stay the Tennessee probate proceeding.

9. Accordingly, the plaintiffs – whose authority as co-executors of the estate of J.D. Davis is governed by the Tennessee probate court – are prohibited from prosecuting this Florida action pending a further ruling from the Tennessee probate court.

An Enlargement Of Time Is Appropriate

10. Rule 1.090(b) of the Florida Rules of Civil Procedure permits a court to enlarge the time within which an act is required for good cause.

11. In light of the plaintiffs' current inability to prosecute this action, good cause exists to enlarge the time within which the defendant must respond to the complaint in this action.

12. The requested enlargement will preserve the parties' and the Court's resources and is consistent with the injunction entered by the Tennessee probate court.

13. If and when the injunction is lifted, the parties can litigate the issues raised by the complaint, including whether the plaintiffs are entitled to bring an action in Florida to enforce the ante-nuptial agreement that was previously declared unenforceable by the Tennessee Court of Appeals.

WHEREFORE, the Defendant, Dorothy Davis, respectfully requests that this Court enter an order enlarging the

time within which she must respond to the complaint so that her response is due to be served no later than thirty days after the Tennessee probate court lifts the current injunction which prohibits plaintiffs from prosecuting this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via regular mail to the following on this **26th** day of September, 2005:

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No. 05-162

FILED
OCT 11 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

ESTATE OF J. D. DAVIS AND J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS,

Petitioners,

v.

DOROTHY L. DAVIS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee, Middle Section At Nashville

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RESPONDENT HAS FAILED TO EXPLAIN WHY THIS CASE IS NOT DESERVING OF REVIEW

In their Petition, Petitioners asserted that "FFC places limits on the ability of a state to apply its 'public policy' to defeat claims originating from other states." (Pet. at 17) In her Brief in Opposition (BIO), Respondent acknowledges this critical threshold point: "[T]here are certain limits on a state's power to pursue its public policy by applying its own law." (BIO at 19) The rest of the substantive component of Respondent's BIO is a merits brief.

Respondent acknowledges that a key issue is whether Tennessee "is competent to legislate" on the matter in issue, noting that "[t]his principle cuts forum states a wide swath." (BIO at 19) True – a wide but not unlimited swath, and the precise contours of that swath are in need of development and elaboration to avoid the kind of proliferation of litigation reflected in this proceeding. That is why this case is certworthy, raising issues both of pragmatic significance and far-reaching constitutional import. It addresses the scope of a forum state's ability to trump its own choice-of-law rules by use of the *deus-ex-machina* "public policy" doctrine – a doctrine that methodologically does not consider or account for FFC analysis.

Petitioners seek review because "there has not been much development regarding the 'nature' of 'relevant' contacts" under this Court's FFC jurisprudence. The "Court has rejected an approach to FFC that encompasses a balancing of sovereign interests among competing states;" this suggests that "determining how 'to delimit spheres of state legislative competence'" must be "more categorical in character" (*e.g.*, marital domicile). (Pet. at 26-28) This case provides an excellent vehicle for addressing these fundamental aspects of FFC doctrine. (Pet. at 11-13, 16-28)

In this case, the Tennessee Court of Appeals did not consider crucial elements of FFC analysis: (i) the nature of

Florida's interest in giving effect to a reciprocal antenuptial agreement entered into in Florida, particularly when the party seeking to breach that agreement is, by her own choice (a choice not available at common law), a Florida domiciliary; (ii) the nature and relevance of Tennessee's interest in abrogating the reciprocal antenuptial agreement because of purported lack of disclosure; (iii) the competence of Tennessee to legislate protectively (*i.e.*, substantively) on behalf of a non-domiciliary when that domiciliary's jurisdiction has expressly chosen to enforce antenuptial agreements even without asset disclosure; and (iv) fairness considerations – the expectations of the parties – that comprise an important component of FFC analysis.

The result of the Court of Appeals' decision is to upset the expectations of this couple – to provide for their own children through their own resources. The decision also turns a symmetrical agreement – each spouse's children look to the resources of their parent – into a strikingly asymmetrical agreement: Ms. Davis' children maintain their financial protection under the agreement but Mr. Davis' children do not. Had Ms. Davis pre-deceased Mr. Davis, her domiciliary status in Florida would have assured that her will was probated in Florida, and the Florida courts would have (properly) given effect to the antenuptial agreement against any putative claim by Mr. Davis or his children.

None of these factors was considered or, methodologically, could be considered under the Court of Appeals' approach. Review is needed by this Court to clarify the "nature" of "relevant" factors in FFC analysis and how to incorporate FFC fairness considerations into the analysis.

On the merits, Respondent echoes both Dr. Pangloss and Chicken Little. The Panglossian dimension is that the case is controlled by recent precedent. (BIO at 17) The Chicken Little dimension is the plea not to unsettle "succession law." (BIO at 27) Neither stance is apropos.

This Court's recent precedent does not render the matter uncertworthy. The concession (BIO at 19) that

limits to state authority exist under FFC and that the Tennessee decision can only be sustained if Tennessee is competent to legislate on the matter indicates that the issue of competence to legislate herein is the critical issue for review; no cited (or uncited) case has resolved that question. Indeed, this case presents the very case foreseen and not addressed in *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 499 (2003) – "a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State."

Respondent asserts that Tennessee has "particularly significant" interests in the "institution of marriage." But this case does not involve the law of wills. It is about the validity of a pre-marital contract that, under Tennessee choice-of-law principles, would normally be governed by Florida law. Respondent wonders what Florida's interest in enforcing the antenuptial agreement is when enforcement "diminish[es] the take of one of its domiciliaries." (BIO at 23) This speaks volumes about Respondent's view of her marital obligations, about the "trust and confidence" she "bring[s] to the institution of marriage." (BIO at 22) The nature of Florida's interest will be developed upon plenary review (if granted), but a state like Florida that consciously promotes reciprocal antenuptial agreements without asset disclosure has strong interests in giving effect to those agreements, even when, in a particular case, one of its domiciliaries faces a short-term disadvantage from enforcement. Just by posing the question, Respondent demonstrates that different states may have different interests with respect to domiciliaries than non-domiciliaries, something that the Court of Appeals' decision did not consider (and had no methodology for considering).

Nothing in this case will unsettle "succession law." Respondent's cases (BIO at 25-27) can be explained as applying forum rules of procedure – rules regarding oral evidence and the formalities of executing an agreement. This Court has adopted the procedure/substance distinction in FFC cases, allowing forum states to apply their own rules of procedure. *Sun Oil Co. v. Wortman*, 486 U.S.

717 (1988). The issues herein are not procedural but substantive – Tennessee's ability to give effect to protective policies for non-domiciliaries when the law of the non-domiciliary's jurisdiction applies under forum choice-of-law rules and when the non-forum jurisdiction does not recognize those protective policies. (Pet. at 21-22) How forum states must treat out-of-state contracts when the party seeking protection is a married non-domiciliary is quite unsettled[1] and is a reason for this Court's granting review.

THIS COURT HAS JURISDICTION

Respondent asserts that this Court lacks jurisdiction for two reasons: (i) the constitutional issues were not raised in the state courts; (ii) the decision below was not a final judgment. Neither assertion withstands analysis.

A. The Full Faith and Credit Clause Issue Was Properly Raised Below.

Lower courts need only be able to discern that "a certain provision of the Constitution" was relied on by the party seeking review. *Green Bay & Mississippi Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 68 (1898). Respondent acknowledges that Petitioners "did, in fact, raise a Full Faith and Credit [FFC] claim." (BIO at 11) That is sufficient.

Respondent asserts that the FFC claim, as argued below, was "strikingly different" than the FFC claim raised in the Certiorari Petition. (BIO at 11) This is immaterial. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee*

---

[1] *In re Bulova's Will*, 220 N.Y.S.2d 541 (App. Div. 1961), which dealt with the formalities in executing an agreement (a matter of procedure), both spouses were New York domiciliaries. Even in that context, the court recognized that the resolution of the issues might be different if the parties were non-domiciliaries. *Id.* at 547 n.3. In this case, Respondent is now and has always been a domiciliary of Florida, not Tennessee.

v. City of Escondido, 503 U.S. 519, 534 (1992). Petitioners are permitted to make "separate arguments in support of a single claim." *Id.* at 535. Thus, having raised the FFC issue below, Petitioners may "formulate[] any argument they like[] in support of that claim here." *Id.*

Petitioners properly raised an FFC claim and did much more than the minimum required. They raised the FFC issue in the Court of Appeals. (Appellees' Brief at 12-13, App. A-2) (noting that Tennessee must give FFC to acts of other states). No decision had called FFC into question at that time, yet the FFC constraints on reversing the trial court's summary judgment order were clearly before the Court of Appeals. Respondent acknowledged this: "Contrary to Appellees' assertion, Tennessee courts are not required to give full faith and credit to laws of another state that are violative of clearly recognized Tennessee public policy." (Reply Brief of Plaintiff-Appellant at 10-12, App. B-2)

Once the Court of Appeals ruled, thereby raising and also clarifying the FFC issue, Petitioners included the FFC claim as the first question presented for review in their Application for Permission to Appeal to the Tennessee Supreme Court. (Application for Permission to Appeal at 9-16, App. C-2) Petitioners asserted (citing authority) that FFC places "limits" on the "extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another." (*Id.* at 10, App. C-4) The Court of Appeals' decision had "constitutional infirmities" under FFC. (*Id.* at 19, App. C-15)

That the FFC issue was before the Tennessee Supreme Court is also established by Ms. Davis' response to Petitioners' Application for Permission to Appeal: The estate's executors "maintain that the Court of Appeals' decision is unconstitutional in that it violates [FFC]. . . . In their presentation of the case law interpreting and applying [FFC], however, the Respondents/Appellants make an important analytical error." (Answer in Opposition to

Respondents/Appellants' Application for Permission to Appeal at 6, App. D-2; *see also id.* at 16-17, App. D-11[2])

In short, the FFC issue was presented to and was before the Tennessee courts in this matter.[3]

B. The Decision of the Court of Appeals was Final.

Respondent asserts that the finality rule has not been satisfied. (BIO at 5-16) The cases do not support that claim.

The operative decision under review is that of the Tennessee Court of Appeals. Where the highest court of a state refuses to review the judgment of an inferior court, as herein, the judgment of the inferior court becomes the final judgment for purposes of review by this Court. *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 109 (1963).

For decades, this Court has given a "practical rather than a technical construction" of 28 U.S.C. §1257(a), *Cohen v. Beneficial Industry Loan Corp.*, 337 U.S. 541, 546 (1949), using a "pragmatic approach" in determining finality. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). In determining finality, "the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying

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[2] Respondent asserts that Petitioners did not specify where and when the FFC issue was raised below. (BIO at 16-17) Any such omission is curable and the details provided above effect that cure. In *Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997), the Court treated the requirements of Rule 14.1(g)(i) as curable, even at the merits stage (but not therein cured). The specification in this Reply Brief either comports with the requirements of Rule 14.1(g)(i) as occurring at the Certiorari stage or effectively cures any omission by providing the detailed required information.

[3] To the extent that there remains any ambiguity on this issue – and there should be none – this Court should provide Petitioners with an opportunity to seek a Certificate from the Tennessee courts attesting to the fact that the FFC issue was presented to and properly before them. For a case following that procedure, *see Allenberg Cotton Co., Inc. v. Pittman*, 414 U.S. 1109 (1973); 419 U.S. 20 (1974).

justice by delay on the other.'" *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). The costs of delay in this matter are considerable, potentially draining the estate's assets through litigation expenses. *Cf. Marshall v. Marshall*, 392 F.3d 1118 (9th Cir. 2004), *cert. granted*, No. 04-1544; *Hughes Tool Co. v. TWA, Inc.*, 409 U.S. 363, 364 n.1 (1973); *id.* at 389-393 & n.10 (Burger, C.J., dissenting) (noting extraordinary expense and inefficiency from failure to resolve threshold issue of federal law, with Court dismissing certiorari and remanding for trial, and then holding that entire litigation was for naught because federal law granted immunity). Respondent proposes an approach with high litigation costs and the risk of conflicting multi-jurisdictional judgments as in *Marshall*, which this Court will review. But (like most) this estate is without the resources of that one.

In *Cohen*, a case with choice-of-law issues analogous to those herein, the issue was whether a state fee-shifting statute applied in a federal court sitting in diversity. *Cohen v. Beneficial Industry Loan Corp.*, 337 U.S. 541, 543-44. The District Court held not, declining to require security; the Court of Appeals reversed. *Id.* at 545. Even though the case had not proceeded beyond the security issue, this Court granted review. *Id.* at 546-47. The claims were from a "final disposition" of a discrete federal choice-of-law question – whether the state statute was substantive or procedural in a diversity action. It serves the policy of 28 U.S.C. §1257(a) for this Court to determine such discrete threshold federal issues as choice-of-law, jurisdiction, or venue – matters "anterior to the merits" – so that litigants are not subjected "to long and complex litigation which may all be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (regarding venue); *see also Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 548-50 (1963) (regarding state court jurisdiction).

Respondent's position, that review is premature, would put the parties to great and needless expense and run the "danger of denying justice by delay." *Gillespie*, 379 U.S. at 153. "Immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'" *Cox*, 420 U.S. at 477-78. If unreviewed, the Court of Appeals' decision may result in further proceedings in Tennessee under an unconstitutional choice-of-law principle; simultaneously, it has spurred litigation by the estate in Florida that is likely unnecessary if Florida law controlled the Tennessee litigation. And it is doubtful that Respondent can prevent the Florida litigation from proceeding. *See* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 823 (1969).

Contrary to Respondent's assertion, the related but separable Florida litigation does not deprive the Court of Appeals' decision of finality. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 125 (1945). All that Tennessee can decide is that the antenuptial agreement is unenforceable in Tennessee, not that it is invalid or unenforceable in Florida. What lack of review will do, however, is leave intact and unscrutinized a troubling choice-of-law precedent that will continue to bind these proceedings in Tennessee. Since that decision may avoid review, "the battle over the constitutionality" of the decision could be "lost as far as this case is concerned." *North Dakota St. Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 163 (1973); *Cox*, 420 U.S. at 485-86 & n.13. Such a decision is final. It leaves intact an erroneous FFC judgment on an important matter of federalism. *Hughes v. Fetter*, 341 U.S. 609, 611-12 (1951).

Where additional proceedings are to occur, finality exists when, as here, there is a "final judgment on the federal issue for purposes of state-court proceedings," and there are "no other federal issues to be resolved." This assures that there is "no probability of piecemeal review

with respect to federal issues." *Flynt v. Ohio*, 451 U.S. 619, 621 (1981).

In this case, the Court of Appeals' choice-of-law decision raises and finally decides the federal FFC issue "for purposes of state-court proceedings." There are no other federal issues to be determined on remand; as Respondent acknowledges, the only issues on remand are matters of *state* law. (BIO at 15) ("Were the public policy ground barred, Mrs. Davis could still proceed with her claim for statutory rights and the invalidity of the waiver based on the theory of duress"). In such circumstances, finality exists because there is no risk of piecemeal review of the *federal* issues. *Accord*, *Cox*, 420 U.S. at 477 (finality exists when the "additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date" because "wholly unrelated to the federal question"); *WOW*, 326 U.S. at 127 (a "presupposition" of finality in such circumstances is that the remaining issues will not "give rise to a federal question"). *See also Snyder's Drug*, 414 U.S. at 162-63 (finality exists even though "[t]here were state law questions to be considered on the remand, for the state board had also rested its denial of a permit on the failure of Snyder's to meet certain structural and safety standards. The [North Dakota] Supreme Court remanded for an administrative hearing on those other issues").

Respondent further asserts that finality does not exist because Petitioners "have other grounds on which they could prevail." (BIO at 14) Contrary to Respondent's assertion, the possibility that Petitioners herein may prevail on nonfederal grounds does not deprive the Court of Appeals' decision of finality: "That the petitioner who protests against the state court's decision on the federal question might prevail on the merits on nonfederal grounds in the course of further proceedings anticipated in the state court and hence obviate later review of the federal issue [in this Court] is not preclusive of our jurisdiction." *Cox*, 420 U.S. at 486 n.13.

CONCLUSION

In sum, certiorari should be granted. There is no jurisdictional barrier to this Court's hearing Petitioner's important FFC claim. In the circumstances of this case, none of the reasons cited by Respondent – (a) the existence of related but separable litigation in Florida; (b) the possibility that Respondent might prevail on her state-law duress claim; or (c) the possibility that Petitioners might prevail on state-law grounds on remand – deprive this Court of jurisdiction. Indeed, to the contrary, there are overriding reasons for this Court to hear this matter at this timely time, when intervention can (i) forestall wasteful, duplicative expense; (ii) pretermit the need for existing litigation in Florida; and (iii) provide review and guidance on an important matter of federalism under FFC.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

DOROTHY L. DAVIS, Petitioner/Appellant, J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS, Respondents/Appellees.	)	No. M2003-02614-COA-R3-CV Appeal as of right from the Seventh Circuit Court (Probate Division), Davidson County No. 02P-0859

BRIEF OF APPELLEES, J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS

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ORAL ARGUMENT REQUESTED

* * *

A. Both the U.S. Constitution and the Tennessee Constitution require Tennessee to give full faith and credit to every other state's acts, records, and judicial proceedings.

The United States Constitution requires each state to give full faith and credit to every other state's public acts, records, and judicial proceedings. U.S. Const. art. IV, Section 1 provides as follows:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1.

The Tennessee Constitution contains a virtually identical provision at Article IV, Section 1, which provides as follows:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Tenn. Const. art. IV, § I.

B. Tennessee must afford full faith and credit to the laws of Florida unless no doubt exists that doing so would clearly prejudice the public interest of the citizens of the State of Tennessee.

"[W]here the law of another jurisdiction is applicable, Tennessee will enforce the substantive rights which litigants have under the laws of the other jurisdiction if such rights are not contrary to the policy of Tennessee." *Hyde v. Hyde*, 562 S.W.2d 194, 196 (Tenn. 1978). *See also Alcazar v. Hayes*, 982 S.W.2d 845, 851 (Tenn. 1998) (quoting *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 530 (Tenn. 1991) and holding that "[u]nless a private contract tends to harm the public good, public interest, or public welfare, or to conflict with the constitution, laws, or judicial decisions of Tennessee, it does not violate public policy.").

Tennessee courts have defined public policy as "the present concept of public welfare or general good." *Smith v. Gore*, 728 S.W.2d 738, 746-747 (Tenn. 1987).

The mere fact that the law of a sister state differs from the law of Tennessee does not render that state's law contrary to Tennessee public policy. *Brown v. Hogan*, 14 Tenn. App. 251, 254 (1931) (quoting *Whitlow v. N.C. & St. L. Ry. Co.*, 84 S.W. 618, 621 (Tenn. 1904)). *See also Parsons v. American Trust & Banking Co.*, 73 S.W.2d 698, 700 (Tenn. 1934) (holding that public policy did not forbid the enforcement of a Florida cause of action not available in Tennessee and quoting Justice Cardozo's observation in *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. Ct. App. 1918) that "If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to

him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.); *Francis v. Francis,* 945 S.W.2d 752, 753 (Tenn. Ct. App. 1996) (holding that the fact that Tennessee had abolished the tort of alienation of affections was not a basis for refusing to afford full faith and credit to a North Carolina judgment based upon that tort); *Four Seasons Gardening & Landscaping, Inc. v. Crouch,* 688 S.W.2d 439, 445 (Tenn. Ct. App. 1984) (holding that, "the judgment of the court of another state does not necessarily violate the public policy of this State merely because the law upon which it is based is different from our law.").

Before declaring a contract void on public policy grounds, a court must determine that no doubt exists that enforcing the contract would clearly prejudice the public interest. *Stansell v. Roach,* 246 S.W. 520, 522 (Tenn. 1923).

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate ***some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.***

Robinson Property Group, L.P. v. Russell, 2000 Westlaw 33191731, *4 (quoting Judge Cardozo in *Loucks v. Standard Oil Co.,* 120 N.E. 198 (N.Y. Ct. App. 1918)). [Emphasis added]

When determining whether a contract is void in violation of public policy, a court may properly consider the "situation of the parties at the time the contract was made

and the purposes of the contract." *Hoyt v. Hoyt,* 372 S.W.2d 300, 303 (Tenn. 1963) (holding that reconciliation

* * *

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE MIDDLE SECTION AT NASHVILLE

IN RE:
THE ESTATE OF J.D. DAVIS, DECEASED

Dorothy L. Davis,	
Plaintiff-Appellant,	**Appeal No. M2003-02614-COA-R3-CV**
v.	
J. Douglas Davis, Julie Ann Davis Griffin, Co-Executors,	**Appeal as of Right from the Seventh Circuit Court (Probate Division), Davidson County**
Defendants-Appellees.	

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ORAL ARGUMENT REQUESTED

* * *

Ins. Co. v. Haney, 425 S.W.2d 590, 592 (Tenn. 1968); *National Garage Co. v. George H. McFadden & Bro., Inc.*, 542 S.W.2d 371, 374 (Tenn. Ct. App. 1975) (contract should be construed "most strictly" against the drafter); *Wilson v. Moore*, 929 S.W.2d 367, 373 (Tenn. Ct. App. 1996) ("Ambiguities in contract language should be construed against the party responsible for drafting the contract."). This rule of construction is especially called for here, since Mrs. Davis did not even have an opportunity to review the agreement before signing it.

IV. CONTRARY TO APPELLEES' ASSERTION, TENNESSEE COURTS ARE NOT REQUIRED TO GIVE FULL FAITH AND CREDIT TO LAWS OF ANOTHER STATE THAT ARE VIOLATIVE OF CLEARLY RECOGNIZED TENNESSEE PUBLIC POLICY.

The Defendants contend [Appellees' Br. at 13] that, as a matter of full faith and credit, a Tennessee court must give effect to the law of the state where a contract was executed. This assertion is simply incorrect. The full faith and credit clause of the United States Constitution applies principally to the enforcement by one state of a *judgment* rendered by a court of another. It provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe in the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST., art. IV, § 1. *See also* TENN. CONST., art. IV, § 1 (setting forth a similar provision).

There is no Florida judgment in this case. Therefore, the captioned argument beginning on page 13 of Appellees' Brief, which maintains that the full faith and credit clause requires application of Florida law, is incorrect. Likewise, the gambling debt cases cited on pages 20-21 of the Appellees' Brief are not relevant to this case as they involve suits to enforce existing judgments rendered in other states. This Court made this point explicitly in *Boardwalk Regency Corp. v. Patterson*, No. M11999-02805-COA-R3-CV, 2001 WL 1613892 (Dec. 18, 2001), in which this Court stated: "In the words of the Tennessee Supreme Court, reducing a gambling debt to judgment 'purifies the contract from the gaming taint.'" The same is true of *Hyde v. Hyde*, 562 S.W.2d 194 (Tenn. 1978), *Francis v. Francis*, 945 S.W.2d 752 (Tenn. Ct. App. 1989), and *Four Seasons Gardening & Landscaping, Inc. v. Crouch*, 688 S.W.2d 439 (Tenn. Ct. App. 1984). These cases also involved enforcement of foreign judgments. As for *Brown v. Hogan*, 14 Tenn. App. 251 (1931), it actually recognized that Tennessee need not give effect to the laws of another state if "prejudicial to the general interests of its own citizens." *Parsons v. American Tr. & Banking Co.*, 73 S.W.2d 698, 700 (Tenn. 1934), also cited by the Appellees, simply found that Alabama law was not in conflict with Tennessee public policy because there was only a "single difference" in the two states' laws.

Even if Florida's law, which excuses disclosure of assets in the probate context, is deemed a public law under the full faith and credit clause, Tennessee's own statute requiring disclosure trumps it. As was stated by the United States Supreme Court in *Nevada v. Hall*, 440 U.S. 410, 421-22 (1979), "[T]he Full Faith and Credit Clause does not require a State to apply another State's

law in violation of its own legitimate public policy." *See also Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Rosengarten v. Downes*, 802 A.2d 170, 178 (Conn. Ct. App. 2002). Indeed, the United States Supreme Court has held that a state court is constitutionally free to apply its own law rather than the law of any other state as long as it has a significant contact or aggregation of contacts with the matter. *See Phillips Petroleum v. Shutter*, 472 U.S. 797, 821-22 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

The antenuptial agreement in the present case has many significant contacts with the Tennessee forum. The decedent was a domiciliary of Tennessee when he signed the agreement and remained one throughout his life until his death. The parties routinely spent six months each year in Tennessee. They maintained a Tennessee residence from the time of their marriage until the decedent's death. During their marriage, the decedent identified himself as a citizen of Tennessee on official documents. Most of the assets regarding which Mrs. Davis now makes her claim as a surviving spouse were situated in Tennessee and still are situated here. In light of these very significant contacts, Tennessee is constitutionally free to apply its own law in pursuit of its public policy rather than that of Florida.

What then is Tennessee's public policy? The Defendants would have this Court believe that it is to favor antenuptial agreements, *no matter how procured*. The Defendants explain that Tennessee courts have recognized that antenuptial agreements foster the marital relationship by eliminating the tendentious issue of marital property rights. [Appellees' Br. at 15-16] Actually, Tennessee's public policy toward antenuptial agreements is

considerably more sophisticated than the Defendants' characterization. As the Tennessee Supreme Court in *Randolph v. Randolph*, 937 S.W.2d at 821, made clear, antenuptial agreements implicate special public policy concerns, because "the State has an interest in and is party to every marriage." Moreover, antenuptial agreements are not like other contracts. They involve confidential relationships, are not formed as a result of

* * *

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE

DOROTHY L. DAVIS, Petitioner/Appellee, J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS, Respondents/Appellants.	Supreme Court Case No. ___ ON APPEAL FROM THE TENNESSEE COURT OF APPEALS, MIDDLE SECTION AT NASHVILLE

APPLICATION FOR PERMISSION TO APPEAL

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IF APPEAL IS GRANTED, ORAL ARGUMENT ON THE MERITS IS REQUESTED.

* * *

VII. ARGUMENT IN SUPPORT OF THE ESTATE'S APPLICATION FOR PERMISSION TO APPEAL

Rule 11(a) of the Tennessee Rules of Appellate Procedure lists "the character of reasons" that this Court will consider when determining whether to grant permission to appeal. These reasons, which neither control nor limit the

court's discretion, include (1) the need to secure uniformity of decision; (2) the need to secure settlement of important issues of law; (3) the need to secure settlement of important questions of public interest; and, (4) the need for the exercise of the Supreme Court's supervisory authority. Tenn. R. App. Proc. 11(a).

The Estate's Application for Permission to Appeal should be granted because each of the four "character of reasons" is present in this case.

A. THE DECISION OF THE COURT OF APPEALS IS UNCONSTITUTIONAL. THE COURT OF APPEALS ERRED IN HOLDING THAT AN ANTENUPTIAL AGREEMENT EXECUTED BY A FLORIDA DOMICILIARY WITH HER HUSBAND, A RESIDENT OF BOTH TENNESSEE AND FLORIDA, WHILE BOTH WERE IN FLORIDA, AND VALID UNDER FLORIDA LAW IS UNENFORCEABLE BECAUSE IT IS CONTRARY TO THE PUBLIC POLICY OF TENNESSEE. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE FULL FAITH AND CREDIT CLAUSES OF BOTH THE U.S. AND TENNESSEE CONSTITUTIONS.

Although the Court of Appeals never mentioned in its decision the constitutional provisions in the U.S. and Tennessee constitutions which require Tennessee to afford full faith and credit to the acts, records, and judicial proceedings of sister states, that is where this Court's analysis should start.

1. Both the U.S. and Tennessee constitutions require Tennessee to give full faith and credit to every other state's acts, records, and judicial proceedings.

Article IV, Section 1, of the U.S. Constitution provides as follows:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Tennessee Constitution contains a virtually identical provision at Article IV, Section 1.

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

According to the United States Supreme Court, the purpose of the full faith and credit clause is to

> [A]lter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77, 56 S.Ct. 229, 234, (1935).

2. A state may refuse to afford full faith and credit to a sister state's acts, records, and judicial proceedings only in the rare case where doing so will offend fundamental policies of the forum state.

a. The public policy exception to the full faith mandate recognizes that, in rare circumstances, the forum state may refuse to afford full faith and credit to the acts, records, and judicial proceedings of a sister state.

Although the full faith and credit clause itself does not contain any exceptions to its mandate, "the command of the Constitution . . . is not all-embracing." *Id.* at 273-74, 232. "[C]onsistent[] with the full-faith and credit clause there may be limits to the extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another." *Id.* at 273, 232. On the other hand, it has long been recognized that states sometimes must sacrifice their local public policies in order to uphold the unifying principle of the full faith and credit clause. *Sherrer v. Sherrer,* 334 U.S. 343, 355, 68 S.Ct. 1087, 1092-93 (1948).

> The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation. If in its application local policy must at times be required to give way, such 'is part of the price of our federal system.'
>
> * * *
>
> This is not to say that in no case may an area be recognized in which reasonable accommodations

> of interest may properly be made. But as this Court has heretofore made clear, that area is of limited extent. . . . We believe that assurances that such a power will be exercised sparingly and wisely render it no less repugnant to the constitutional commands.

Id. (citing *Williams v. North Carolina,* 317 U.S. 287, 302, 63 S.Ct. 2017, 215 (1942)).

This public policy exception to the full faith and credit clause is to be narrowly construed and applied only when fundamental policies of the forum state are offended. Judge Cardozo penned the classic formulation of when a court may refuse to enforce the laws of a sister state.

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate ***some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal***.

Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. Ct. App. 1918). (emphasis added)

Mr. Justice William Fones characterized the public policy exception as follows:

> [W]here the law of another jurisdiction is applicable, Tennessee will enforce the substantive rights which litigants have under the laws of the other jurisdiction if such rights are not contrary to the policy of Tennessee.

Hyde v. Hyde, 562 S.W.2d 194, 196 (Tenn. 1978).

b. Tennessee may refuse, on public policy grounds, to enforce a private contract otherwise valid under the laws of a sister state only where enforcement would tend to harm the public good, public interest, or public welfare, or to conflict with the constitution, laws, or judicial decisions of Tennessee.

Tennessee courts may not refuse enforcement of contracts on public policy grounds unless no doubt exists that enforcing the contract would clearly prejudice the public interest. *Stansell v. Roach,* 246 S.W. 520, 522 (Tenn. 1923). *See also Alcazar v. Hayes,* 982 S.W.2d 845, 851 (Tenn. 1998) (quoting *Spiegel v. Thomas, Mann & Smith, P.C.,* 811 S.W.2d 528, 530 (Tenn. 1991) and holding that "[u]nless a private contract tends to harm the public good, public interest, or public welfare, or to conflict with the constitution, laws, or judicial decisions of Tennessee, it does not violate public policy.").

The mere fact that the law of a sister state differs from the law of Tennessee does not render that state's law contrary to Tennessee public policy. *Brown v. Hogan,* 14 Tenn. App. 251, 254 (1931) (quoting *Whitlow v. N. C. & St. L. Ry. Co.,* 84 S.W. 618, 621 (Tenn. 1904)). *See also Parsons v. American Trust & Banking Co.,* 73 S.W.2d 698, 701 (Tenn. 1934) (holding that public policy did not forbid the enforcement of a Florida cause of action – suit for wrongful death commenced after the death of the wrongdoer – which was not available in Tennessee. The *Parsons* opinion quotes Justice Cardozo's observation in *Loucks v. Standard Oil Co.,* 120 N.E. 198, 201 (N.Y. Ct. App. 1918) that "If a foreign statute gives the right, the mere fact that

we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."); *Francis v. Francis,* 945 S.W.2d 752, 753 (Tenn. Ct. App. 1996) (holding that the fact that Tennessee had abolished the tort of alienation of affections was not a basis for refusing to afford full faith and credit to a North Carolina judgment based upon that tort); *Four Seasons Gardening & Landscaping, Inc. v. Crouch,* 688 S.W.2d 439, 445 (Tenn. Ct. App. 1984) (applying the law of Georgia to a contract between a Georgia corporation and a Tennessee resident and enforcing a Georgia default judgment against the Tennessee resident despite the fact that the remedies awarded in Georgia differed from those available in Tennessee. The Court noted that, "the judgment of the court of another state does not necessarily violate the public policy of this State merely because the law upon which it is based is different from our law.").

3. U.S. and Tennessee Supreme Court cases require a court to engage in a two-part process when determining whether it is constitutionally permissible to apply the public policy exception to the full faith and credit clause.

In *Smith v. Gore,* this Court held that a court must engage in a two-part process when determining whether to refuse to enforce a contract on public policy grounds. First, the court must decide "whether or not any controlling public policy has been established or declared." *Smith v. Gore,* 728 S.W.2d 738, 746 (Tenn. 1987). Second, the Court must determine how that policy applies to the facts of the

particular ease. *Id. See also Alaska Packers Assn v. Industrial Accident Commission of California,* 294 U.S. 532, 544-49, 55 S.Ct. 518, 522-25 (1935) (identifying relevant public policies and then weighing competing policies to hold that an injured employee could recover workers compensation benefits in California, where the contract for employment was formed, as opposed to being required to seek a remedy under the laws of Alaska where the injury occurred.)

a. The court must first identify all relevant public policies.

The court's first step in determining whether a private contract harms the public good, public interest, or public welfare, or conflicts with the constitution, laws, or judicial decisions of Tennessee, is to correctly identify any and all relevant public policies.

> The law in Tennessee restricts this Court's role in declaring public policy. The Court is not free to establish what its members believe to be the best policy for the State; rather, we must determine where public policy is to be found, what the specific public policy is, and how it is applicable to the case at hand. Ordinarily, the Court is not the institution that is called upon to divine the nature of public policy in its most general terms; this Court usually decides whether or not any controlling public policy has been established or declared and then determines how it applies to a particular case.

Smith v. Gore, 728 S.W.2d at 746.

As this Court recognized in *Home Beneficial Ass'n v. White,* "'the meaning of the phrase 'public policy is vague and variable; courts have not defined it, and there is no fixed rule to determine what contracts are repugnant to it.'" *Home Beneficial Ass'n v. White,* 177 S.W.2d 545, 546 (Tenn. 1994). (citations omitted)

Generally, the public policy of Tennessee "is to be found in its constitution, statutes, judicial decisions and applicable rules of common law." *Id.* at 588-89. However, as this Court noted in the case of *Pennegar and Haney v. State,* not every case or every provision of a statute is indicative of a state policy. *Pennegar and Haney v. State,* 10 S.W. 305, 306 (Tenn. 1888). That case, which addressed the issue of whether a common-law marriage contracted in Alabama specifically for the purpose of avoiding a Tennessee criminal statute prohibiting a spouse divorced for adultery from marrying the adulterous partner during the lifetime of his or her former spouse, required the Court to consider and reconcile various public policies. Noting that, "[i]t is not always easy to determine what is a positive State policy," the Court recognized that not every relevant case or statute is an embodiment of state policy.

> It will not do to say that every provision of a statute prohibiting marriage under circumstances, or between certain parties, is indicative of a State policy in the sense in which it is used in this connection.

Id.

b. The Court next must balance the relevant policies against the full faith mandate and can refuse to enforce an otherwise valid contract only where no doubt exists that doing so would clearly prejudice the public in some specific manner.

The court's second step in deciding whether enforcement of a contract will violate the state's public policy is to determine how the relevant policies apply to the facts of the particular case. *Smith v. Gore,* 728 S.W.2d at 746. This step requires the court to carefully balance the public policies at issue against the mandates of full faith.

In *Alcazar v. Hayes,* the Court performed this two-step analysis in a case where it was asked to determine whether an insured who failed to comply with the notice provision of her insurance policy could nevertheless enforce the policy so long as the insurer had not been prejudiced by the delay. *Alcazar v. Hayes,* 982 S.W.2d at 856. The Court first recited that

> For years Tennessee has consistently adhered to the traditional common law approach that: (1) notice is a condition precedent to recovery under the policy and (2) there need not be any showing of prejudice

Id. at 849. The Court then went on to identify the other relevant public policies, including minimization of litigation, the interest of insurers in protecting their interests by being able to promptly investigate claims and prepare a defense, the compensation of tort victims, and the construction of insurance contracts in favor of the insured. *Id.* at 850-54. Once it had identified the relevant polices, the Court turned to the second part of the *Smith v. Gore*

analysis and carefully weighed the competing public policies. The Court found that certain of these policies combined to justify abandoning the traditional approach to this issue and, as a result, the Court adopted the modern rule that an insured did not forfeit his or her rights under an uninsured motorist policy due to a delay in complying with the policy's notice provision unless the insurer had been prejudiced by the delay in notice. *Id.* at 856.

This Court also performed the two-step analysis in *Hyde v. Hyde,* which is similar to the present case. In *Hyde*, this Court was asked to decide whether a divorce decree entered by a Dominican Republic court for parties who were domiciled in Memphis, Tennessee, was valid. *Hyde v. Hyde,* 562 S.W.2d at 197. When performing the first step of the analysis, the Court identified the relevant policies, namely Tennessee's policy favoring marriage; the state's decision to permit divorce on the ground of irreconcilable differences; and the more general policy against the state surrendering its sovereignty "to a foreign nation whose laws evince no interest in maintaining the stability of marriage as an institution." *Id.* at 197. The Court next turned to weighing these policies and decided that the policy permitting divorce took precedence over the state's interest in preserving its sovereignty and held that the foreign judgment was valid and enforceable in Tennessee. *Id.* at 198.

4. Because the Court of Appeals failed to identify all relevant public policies and to properly balance those policies against the full faith mandate, it refused to enforce a Florida contract in violation of the U.S. and Tennessee constitutions.

a. The Court of Appeals failed to properly identify all relevant public policies.

Rather than performing this first, basic step, the Court of Appeals incorrectly – and seemingly arbitrarily – identified what it considered to be the one relevant public policy – full disclosure. *In re Davis,* 2004 Tenn. App. LEXIS 585, at *17-18 (Tenn. Ct. App. Aug. 3, 2004).[7]

For reasons not explained in its decision, the Court ignored the numerous fundamental public policies which were critical to its analysis, policies which have long influenced the laws of this state and the decisions of its courts. These include policies favoring: (1) enforcement of contracts in general; (2) enforcement of antenuptial contracts in particular; (3) marriage; (4) marital stability; (5) contractual certainty; (6) enforcement of the wishes of testators; (7) minimization of litigation; and, (8) protection and enforcement of rights so as to avoid forfeiture. *Alcazar v. Hayes*, 982 S.W.2d at 849 (minimization of litigation); *Home Beneficial Ass'n v. White*, 177 S.W.2d at 546 (enforcement of contracts); *Wright v. Brandon*, 863 S.W.2d 400, 402 (Tenn. 1993) (enforcement of the intent of

[7] The Court of Appeals' opinion contains no mention of the fact that the Agreement, signed by Mrs. Davis, contains a provision indicating that both parties had disclosed to one another the nature and extent of their holdings. I R. 83.

testators); *Perkinson v. Perkinson*, 802 S.W.2d 600, 601 (Tenn. 1990) (antenuptial agreements); *Hoyt v. Hoyt*, 372 S.W.2d 300, 302-03 (Tenn. 1963) (marriage and marital stability); *Craft v. Forklift Sys.*, 2003 Tenn. App. LEXIS 491, at *8 (Tenn. Ct. App. May 8, 2003) (contractual certainty); *Sanders v. Sanders*, 288 S.W.2d 473, 479 (Tenn. Ct. App. 1955) (forfeitures).

In choosing to base its decision on a single policy, namely full disclosure, the Court of Appeals ignored the clear mandate of this Court that "[t]he Court is not free to establish what its members believe to be the best policy for the State." *Smith v. Gore*, 728 S.W.2d at 746.

Furthermore, full disclosure is not a policy at all; instead, it is one of the many factors to be considered in the application of this state's policy favoring the enforcement of antenuptial agreements. Full disclosure is simply one factor to be considered when determining whether an antenuptial agreement should be enforced.

Tennessee's statute governing antenuptial *agreements* makes absolutely no mention of full disclosure or independent knowledge. T.C.A. § 36-3-501 (West 2004).[8] Instead, the statute

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[8] Tenn. Code Ann. Section 36-3-501 provides as follows:

Notwithstanding any other provision of law to the contrary, except as provided in § 36-3-502, any antenuptial or prenuptial agreement entered into by spouses concerning property owned by either spouse before the marriage which is the subject of such agreement shall be binding upon any court having jurisdiction over such spouses and/or such agreement if such agreement is determined, in the discretion of such court, to have been entered into by such spouses freely, knowledgeably and in good faith and without exertion of

(Continued on following page)

* * *

provides that antenuptial agreements are valid when they have been entered into "freely, knowledgeably and in good faith and without exertion of duress or undue influence *upon* either spouse." *Id.* Apparently, as far as the General Assembly was concerned, full disclosure or independent knowledge were not sufficiently important enough to merit specific mention in the body of the statute, despite the fact that courts had required full disclosure or independent knowledge for decades.[9] *See, e.g., Baker v. Baker,* 142 S.W.2d 737, 746 (Tenn. 1940) (holding the burden was upon the proponents of an antenuptial agreement to show either that there was a full disclosure of the nature, extent, and value of the husband's property, or that the widow otherwise had full knowledge of her spouse's property and voluntarily entered into contract with such knowledge).

The decision of the Court of Appeals therefore should be reviewed because, instead of identifying all of the relevant public policies of this state, the Court of Appeals chose to rely solely upon a single policy and reached a

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duress or undue influence upon either spouse. The terms of such agreement shall be enforceable by all remedies available for enforcement of contract terms.

[9] In *Randolph v. Randolph,* this Court interpreted the "knowledgeably" requirement in the statute as requiring

> [E]ither that a full and fair disclosure of the nature, extent, and value of his or her holdings [be] provided to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent knowledge of the full nature, extent, and value of the proponent spouse's holdings.

Randolph v. Randolph, 937 S.W.2d 815, 821 (Tenn. 1996).

decision which violates the full faith and credit clauses of both the U.S. and Tennessee constitutions.

b. Because the Court of Appeals failed to properly identify all relevant public policies, it was unable to engage in the proper balancing of these interests against the constitutional mandate requiring Tennessee to afford full faith and credit to the laws of its sister state, Florida.

The Court of Appeals declared that, because it differed from the laws of this state, the applicable section of the Florida code "violates a substantially important public policy of the State of Tennessee," and, accordingly, the Court of Appeals "decline[ed] to apply the *lex loci* rule to this agreement." *In re Estate of Davis,* 2004 Tenn. App. LEXIS 585, at *21 (Tenn. Ct. App. Aug. 3, 2004).[10]

As a result, the Court of Appeals refused to enforce a valid Florida contract in violation of the U.S. and Tennessee constitutions and well-settled law. The decision of the Court of Appeals should be reviewed – and reversed – due to its constitutional infirmities.

* * *

[10] The Court of Appeals also failed to identify any specific detriment which would undoubtedly result if the contract were enforced as required under this Court's decision in *Stansell v. Roach,* 246 S.W.2d at 522. In addition, the Court of Appeals apparently based its decision, at least in part, upon the domicile of the parties and intended place of performance of the Agreement. Neither of these issues was briefed or argued at the probate court level.

APPENDIX D

IN THE SUPREME COURT
FOR TENNESSEE AT NASHVILLE

IN RE:
THE ESTATE OF J.D. DAVIS,
DECEASED

Dorothy L. Davis,	)	
Petitioner-Appellee,	)	
v.	)	**Appeal No.**
J. Douglas Davis, Julie Ann Davis Griffin,	)	**M2003-02614-SC-R11-CV**
Co-Executors,	)	
Respondents-Appellants.	)	

ANSWER IN OPPOSITION TO
RESPONDENTS/APPELLANTS' APPLICATION
FOR PERMISSION TO APPEAL

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IF APPEAL IS GRANTED,
ORAL ARGUMENT IS REQUESTED

* * *

Bratton, 136 S.W.3d 595, 600-01 (Tenn. 2004), recognizing that, like antenuptial agreements, postnuptial agreements are valid only if entered into "knowledgeably."

A. THE DECISION OF THE COURT OF APPEALS IS CONSTITUTIONAL. ITS DECISION IS ENTIRELY HARMONIOUS WITH THE REQUIREMENTS OF THE FULL FAITH AND CREDIT CLAUSE OF THE U. S. CONSTITUTION.

Respondents/Appellants maintain that the Court of Appeals' decision is unconstitutional in that it violates the Full Faith and Credit Clauses of the United States and Tennessee Constitutions, which Respondents/Appellants contend are virtually identical.[1] In their presentation of the case law interpreting and applying the Full Faith and Credit Clause, however, the Respondents/Appellants make an important analytical error. They fail to distinguish two very different situations, (i) one in which a party has obtained a judgment in another state and seeks to enforce it in Tennessee and (ii) one in which a party has *not* obtained a foreign judgment, but is asking a Tennessee forum court to apply the law of another state even though that law conflicts with the Tennessee forum's own law and an undisputed, strong public policy of Tennessee.

In the first situation described above, a judgment of a court of a sister state generally must be given recognition

[1] Respondents/Appellants quote language which they claim is derived from Art. IV, § 1 of the Tennessee Constitution relating to Full Faith and Credit. In fact, the quoted language does not appear anywhere in the Tennessee Constitution.

and enforced. Tennessee courts are held to a "stern and heavy burden" in this regard, and nothing short of a compelling reason must be proffered for denying recognition. *See Biogen Distrib., Inc. v. Tanner*, 842 S.W.2d 253, 256 (Tenn. Ct. App. 1992). *See also In re Riggs*, 612 S.W.2d 461 (Tenn. Ct. App. 1980). The U.S. Supreme Court cases cited in Respondents/Appellants' Application, pp. 10-11, fall into this category. *See Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935); *Sherrer v. Sherrer*, 334 U.S. 343, 353 (1948); *Williams v. North Carolina*, 317 U.S. 287 (1942).

When a party, as in the present case, is seeking simply to have another state's law applied to a dispute before a Tennessee court, an entirely different standard applies. The issue now is one of a conflict of laws between that of the forum and that of a sister state. The U.S. Supreme Court has held repeatedly that, under the Full Faith and Credit Clause, the forum is entirely free to choose which of the two competing laws it will follow. *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998); *AllState Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Nevada v. Hall*, 440 U.S. 410, 421-22 (1979) ("[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy.").

This very important distinction between (i) enforcement of sister state *judgments* and (ii) forum court application of sister state *laws* could not have been stated more clearly than the United States Supreme Court did in *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998):

> Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. "In numerous cases this Court has held that credit must be given to the judgment of

> another state although the forum would not be required to entertain the suit on which the judgment was founded." *Milwaukee County*, 296 U.S. at 277, 56 S. Ct., at 234. The Full Faith and Credit Clause does not compel "a state to substitute the statute of other states for its own statutes dealing with subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501, 59 S. Ct. 629, 632, 83 L. Ed. 940 (1939); see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19, 105 S. Ct. 2965, 2977-2978, 86 L. Ed. 2d 628 (1985).

In the present case, no *judgment* from Florida was ever obtained as to the validity of the antenuptial agreement. Thus, the requirement as to sister state "judgments" simply does not apply in this case. The Respondents/Appellants have, apparently, failed to appreciate this basic and indisputable distinction recognized in U.S. and Tennessee Constitutional law. Respondents/Appellants rely on *judgment* cases, such as *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935), and *Sherrer v. Sherrer*, 334 U.S. 343, 353 (1948), to argue a constitutional violation by the Tennessee Court of Appeals, even though, unlike those cases, the present case only involves conflicting laws and public policies of Tennessee and the State of Florida.

The decision of the forum court as to which law to apply involves the concept of comity. Ordinarily, when no strong, local public policy is at stake, a court will apply the lex loci contractus in a contract case involving conflict of laws. However, the general approach to comity, the application of another state's law as if it were Tennessee's own, has important limits, long observed by the courts of this State. The Tennessee Supreme Court addressed the

matter head-on in *First Nat'l Bank v. Shaw*, 109 Tenn. 237, 70 S.W. 807 (1902). That case involved an attempt to enforce in Tennessee a note executed in Ohio by a married woman when coverture was still in force in Tennessee. Ohio law allowed enforcement of the note against the wife.

The Tennessee Supreme Court refused to apply Ohio law, the lex loci contractus. This Court held:

> . . . rights and contracts arising under the laws of a foreign state will not be enforced here, except under the doctrine of the comity of states, and . . . this doctrine neither requires nor sanctions the enforcement in the courts of this state of statutory rights and contracts arising under the laws of a foreign state which are repugnant to the policy and spirit of our laws.

First Nat'l Bank, 70 S.W. at 808.

Likewise, in *Sherwin-Williams Co. v. Morris*, 25 Tenn. App. 272, 156 S.W.2d 350 (1941), the Tennessee Court of Appeals refused to enforce a note executed in Georgia waiving right of exemptions as "head of a family." The Court relied, *inter alia*, on the Restatement of Conflict of Laws § 612 (1932), which provides: "no action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the public policy of the forum."

Subsequently, in *Martin v. Dealers Transport Co.*, 48 Tenn. App. 1, 342 S.W.2d 245 (1961), the Court of Appeals refused to enforce a labor contract entered into in Kentucky, since it violated Tennessee's "right to work" laws. The Court quoted from C.J.S., *Contracts*, § 16, at 348-49, in holding that "the instant case falls within that class or

type of cases where the *lex fori* prevails over the *lex loci contractus*:"

> An exception to the general rule that a contract valid under its governing law is valid everywhere is the rule that where the agreement * * * violates the fixed public policy of the state in which the action is brought, it will not be enforced by "public policy of the state" being meant the law of the state, whether found in the Constitution, statutes or judicial records.

48 Tenn. App. at 10-11, 342 S.W.2d at 249. *See also* AMJUR, CONFLICTS OF LAW § 26 (2d ed. Database updated May 2004) ("The public policy of a state is supreme, and, when once established, will not as a rule be relaxed even on the ground of comity to enforce contracts which, though valid where made, contravene such policy."). 17 C.J.S., *Contracts*, § 21(d), at 453 (1999 & 2004 Supp.) ("A court cannot apply the law of another jurisdiction if doing so would contravene the public policy of its own jurisdiction.").

Public policy considerations override comity even when Tennessee is neither the place of execution nor the place of performance of a contract. *See, e.g., Moak v. Continental Cas. Co.*, 4 Tenn. App. 287, 4 (1927), in which the Tennessee Court of Appeals held that:

> However, a contract may be valid by the laws of both the place where it is made and the place where it is to be performed, and yet fail because the lex fori, on the grounds of public policy, will not permit its enforcement. . . . The public policy of a State, established either by express legislative enactment, or by the decisions of its courts, is supreme, and when once established will not,

> as a rule, be relaxed even on the ground of comity to enforce contracts, which, though valid where made, contravene such policy.

Contrary to Respondents/Appellants' attempt to portray as highly unusual and rare the application of Tennessee law by a Tennessee forum when a strong public policy of the State is involved, any such portrayal is incorrect. Rather, a Tennessee court is always free to apply its own law and must, in fact, do so when its own strong public policies are at stake. Since the Full Faith and Credit Clause does not require application of another state's *law*, it makes no sense for Tennessee to ignore the strong public policy pronounced by its own legislature and Supreme Court and defer instead to the sharply conflicting policies of another state's (Florida's) legislature. This would be all the more ill-advised in that the Tennessee position is the one followed by the majority of states, and for good reason. *See* Craig C. Conley, *Family Law – Randolph v. Randolph: Tennessee Requires Full Disclosure or Independent Knowledge for Antenuptial Agreements to be Valid*. 27 U. Memphis L. Rev. 1021, 1023-24 (1997). This law review article makes a telling point by drawing a sharp contrast between the law of Tennessee and Florida:

> Additionally, this approach is far superior to that taken by the Florida legislature and Florida courts, which does not allow nondisclosure to affect the validity of antenuptial agreements. The Florida approach opens the floodgates for inequitable agreements, fraud, and concealment. (footnotes omitted). . . . By imposing the foregoing requirements for valid antenuptial agreements, the Tennessee Supreme Court has attempted to

> afford fairness and protection in an area that can at times be devoid of such niceties.

Id. at 1038.

B. TENNESSEE HAS A STRONG PUBLIC POLICY THAT REQUIRES FULL AND FAIR DISCLOSURE OR INDEPENDENT KNOWLEDGE OF THE OTHER PROSPECTIVE SPOUSE'S FINANCES IN ORDER FOR AN ANTENUPTIAL AGREEMENT TO BE ENFORCEABLE.

Respondents/Appellants devote several pages of their Application for Permission to Appeal, pp. 12-19, to purported flaws in the analysis by which the Court of Appeals reached the conclusion that the public policy of Tennessee requires full and fair disclosure of financial information or independent knowledge. They argue that the Court of Appeals was required to engage in a two-part process to determine whether the public policy exception to the Full Faith and Credit Clause is relevant under the facts of this case. They further argue that all potentially pertinent public policies must be identified and weighed before a particular public policy of Tennessee can be invoked to bar application of another state's law.

Respondents/Appellants' arguments are simply wrong. At no time has this Court held that a two-part process must be followed. Rather, Respondents/Appellants have cobbled together their own two-part process out of bits and pieces of language in a series of opinions. More to the point, the Tennessee legislature, as well as the Tennessee Supreme Court, have spoken clearly and unequivocally as to this State's public policy vis-a-vis antenuptial agreements. In *Randolph v. Randolph*, 937 S.W.2d 815 (Tenn.

1996), decided only a few years ago, this Court explicitly stated that: "It is now well settled in Tennessee that public policy allows the enforcement of antenuptial agreements *if certain prerequisites are satisfied.*" *Id.* at 819 (emphasis added). The Supreme Court then referenced Tennessee Code Annotated § 36-3-501, enacted in 1980, which provides that "if such agreement is determined in the discretion of the court to have been entered into by such spouses freely, knowledgeably and in good faith and without the exertion of duress or undue influence upon either spouse," it is enforceable.

The Tennessee Supreme Court in *Randolph* went on to hold that:

> As we interpret the knowledge element of the statute, the spouse seeking to enforce an antenuptial agreement must prove, by a preponderance of the evidence, either that full and fair disclosure of the nature, extent, and value of his or her holdings, was provided to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent knowledge of the full nature, extent, and value of the proponent's holdings. Under the statute, disclosure or full knowledge *is required in all cases*, not just those which involve an agreement in which the provision for one spouse is wholly disproportionate to the means of the other spouse.

Id. at 821 (emphasis added).

The Court identified three policy considerations underlying the requirement of full and fair disclosure: First, an agreement to marry is different than other contracts. Specifically, the engaged parties are in a confidential

relationship and do not bargain at arm's length. Thus, they are fiduciaries who owe each other the utmost candor. Second, the parties are often very ill-matched in terms of bargaining power, and disclosure helps to correct any imbalance in bargaining power. As this Court explained, it "serves to level the bargaining field for the party in the weaker position." *Id.* Third, unlike other commercial contracts, the State has an interest in and is a party to every marriage. "Often, antenuptial agreements alter the rights parties otherwise would have. . . . Consequently, it is altogether appropriate that parties entering into antenuptial agreements do so with knowledge of the holdings to which they are waiving any claim under state law." *Id.*

The absolute requirement of full and fair disclosure enunciated in *Randolph* has been reaffirmed most recently in *Bratton v. Bratton*, 136 S.W.3d 595 (Tenn. 2004). In *Bratton*, this Court held that postnuptial agreements are not violative of public policy, but only if they satisfy the same safeguards set forth in Tennessee Code Annotated § 36-3-501 with respect to an antenuptial agreement, including that the agreement is entered into "knowledgeably." *Id.* at 601.

* * *

2. The decision of the Court of Appeals is consistent with Tennessee decisions concerning common law marriages entered into in other states.

Respondents/Appellants also argue that, because Tennessee has recognized common law marriages entered into in other states that allow such marriages, Tennessee must now also recognize antenuptial agreements entered into in a state that does not require full and fair disclosure of financial information by prospective spouses. This

argument is based on a strikingly incomplete statement of the law. While the general rule is that a marriage valid where contracted is valid everywhere, there is an important exception to the general rule that has been consistently enforced: a marriage that violates local public policy shall not be recognized locally. *See Pennegar v. State*, 87 Tenn. 244, 248, 10 S.W. 305, 306 (1889).

If Tennessee courts are not permitted to deny recognition to any foreign "marriage," though repugnant to the strong public policy of this State, then the courts of this State will be required to recognize in the future novel "marriages" in other states including same-sex marriages, polygamous marriages, marriages of underage persons, and incestuous marriages. Tennessee has emphatically refused to recognize some of these types of out-of-state marriages in the past as violative of the State's public policy. *See* Tennessee Code Annotated § 36-3-113 (the only recognized marriage in the state is between one man and one woman; effect will not be given to marriages to the contrary solemnized in other states); Tenn. Op. Atty. Gen. No. 96-016 (Feb. 13, 1996) (Burson A.G.) (Full Faith and Credit Clause does not require recognition of validly contracted same-sex marriage in another state); Tenn. Op. Atty. Gen. No. 04-066 (April 19, 2004) (Summers, A.G.) (reaffirming Tenn. Op. Atty. Gen. No. 96-016 as correct statement of Tennessee public policy as well as interpretation of Full Faith and Credit Clause, and concluding that nonrecognition could extend to same-sex civil unions); *Rhodes v. McAfee*, 224 Tenn. 495, 497, 457 S.W.2d 522, 523, 534 (1970) (marriage to stepdaughter valid in Mississippi unenforceable in Tennessee as violative of Tennessee public policy against incest); *Pennegar v. State*, 87 Tenn. 244, 248, 10 S.W. 305, 306 (1889) (marriage to person with

whom spouse engaged in adultery, though allowed in Alabama, was not recognized in Tennessee, as violative of the settled public policy of this State). *See generally* W. Walton Garrett, TENNESSEE DIVORCE, ALIMONY & CHILD CUSTODY § 1:3 (rev. ed. 2004).

* * *